No. 97-475 SEP 11 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

—v.—

TSUI YUAN TSENG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Warsaw Convention, a treaty of the United States, exclusively governs and precludes any recovery for a passenger's injuries sustained in the course of "international transportation" if the injuries were not caused by an "accident" within the meaning of Article 17 of the Convention?

(2) Whether the rule of strict treaty construction must be applied to the written notice of claim provisions prescribed by Article 26 of the Convention?

PARTIES TO THE PROCEEDINGS BELOW

The parties before the Court and to the proceedings below are:

(1) Petitioner EL AL ISRAEL AIRLINES, LTD.

(2) Respondent TSUI YUAN TSENG.

CORPORATE AFFILIATIONS

(1) EL AL ISRAEL AIRLINES, LTD. is an "agency or instrumentality of a foreign state" within the meaning of 28 U.S.C. § 1603 because a majority of its shares are, and have been at all relevant times, owned by the Government of Israel.

(2) EL AL ISRAEL AIRLINES, LTD.'s subsidiaries (other than wholly owned subsidiaries) are Maman Cargo Terminals and Handling Ltd., Taman Aircraft Food Industries Ltd., North American Airlines and Borenstein Caterer's, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner EL AL ISRAEL AIRLINES, LTD. (EL AL) respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered June 13, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit has not yet been officially reported. *See Tseng v. EL AL Israel Airlines, Ltd.*, ___ F.3d ___, Nos. 96-7447, 96-7619, 1997 WL 353230 (2d Cir. June 13, 1997), App. 1a-23a.[1]

[1] References to the Appendix are indicated as App. __a.

The opinion of the United States District Court for the Southern District of New York (Stanton, J.) is reported at 919 F. Supp. 155 (S.D.N.Y. 1996), App. 24a-33a.

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was entered June 13, 1997. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

TREATY PROVISIONS INVOLVED

The articles of the Warsaw Convention[2] expressly involved are Articles 1, 17, 24 and 26.

Article 1(1) of Chapter I, Scope—Definitions, provides:

> (1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

49 Stat. 3014.

Article 17 of Chapter III, Liability of the Carrier, provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000 T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C. § 40105 (1997) (note).

Article 24 of Chapter III, Liability of the Carrier, provides:

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

Article 26 of Chapter III, Liability of the Carrier, provides:

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

49 Stat. 3020.

STATEMENT OF THE CASE

Respondent Tsui Yuan Tseng sued EL AL in the Supreme Court of the State of New York, New York County. She alleged assault, false imprisonment and property damage in connection with a security screening of plaintiff conducted by EL AL prior to her travelling on an EL AL flight to Israel. EL AL removed the case to federal court under 28 U.S.C. §§ 1331 and 1441 because EL AL is a "foreign state" within the meaning of 28 U.S.C. § 1603. Following a non-jury trial, the district court dismissed plaintiff's personal injury claims and awarded damages with respect to her baggage claim. The court of appeals reversed the dismissal of the personal injury claims, affirmed the property damage award without comment and remanded the case to the district court to address the issue of recovery for plaintiff's personal injury claims under state law.

A. Nature of the Case

On May 22, 1993, plaintiff arrived at the EL AL terminal at John F. Kennedy International Airport in New York to travel on EL AL flight 008 to Israel. Upon presenting her ticket and passport to a security guard, plaintiff was admitted into the EL AL terminal. Plaintiff then approached the security area and, in accordance with standard EL AL pre-boarding procedures, was questioned about her destination and travel plans. Based on plaintiff's responses to these questions, she was considered a "high risk" passenger with an "illogical story." Plaintiff was escorted into a private EL AL security room where her baggage and person were searched. EL AL was searching for "[e]xplosives in any size, detonators, . . . from small, like the cap of the pen, and . . . up from that." Defendant did not, at any time, use force to question or search plaintiff and plaintiff did not, at any time, object to the search.

The parties do not dispute that plaintiff was in the course of embarkation of her "international transportation" by EL AL when she allegedly sustained her emotional injuries.

Plaintiff testified that she discovered items were missing from her carry-on baggage during the flight and from her checked baggage when she arrived in Tel Aviv, but does not dispute that it was forty (40) days after her flight when she first notified EL AL in writing that various items in her baggage were missing or had been damaged, and when she first ever claimed that she had been "badly treated" during the security screening procedure. Plaintiff testified that she had made a telephone call to EL AL in Israel to make a complaint about her baggage, but that she was told to make her complaint in the United States.

B. Proceedings Below

The Complaint seeks damages arising out of the alleged assault and false imprisonment of plaintiff and for lost and/or damaged property. Although the Complaint alleges that the pre-boarding search was performed in connection with plaintiff's flight to Israel, it does not make reference to the Warsaw Convention or assert any rights thereunder.

EL AL timely removed the action to the district court on the basis that EL AL is a foreign state within the meaning of 28 U.S.C. § 1603.

A non-jury trial was held March 7, 8 and 11, 1996 before the Honorable Louis L. Stanton of the United States District Court for the Southern District of New York.

At the conclusion of the trial, Judge Stanton ruled, in accordance with his decision in *Shen v. Japan Airlines*, 918 F. Supp. 636 (S.D.N.Y.), *aff'd mem*, 43 F.3d 1459 (2d Cir. 1994), that: (1) EL AL's allegedly offensive security search of plaintiff Tseng constituted an "accident" under Article 17; (2) although EL AL's security suspicions may have been

mistaken, there was no evidence of wilful misconduct; and (3) plaintiff is not entitled to any recovery for her emotional distress injuries because she sustained no bodily injury. App. 27a-28a.

The district court also ostensibly applied the Warsaw Convention to plaintiff's property damage claim. Although the district court noted that plaintiff failed to timely submit written notice of her claim to EL AL, as required by Article 26 of the Convention, the court concluded that EL AL's alleged instruction to plaintiff that she should make a claim in the United States (presumably rather than advising plaintiff to put her claim in writing) constituted fraud, negating the Article 26 written notice requirement. App. 30a-31a.

Plaintiff appealed to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. §§ 2106 and 2107, seeking to reverse the dismissal of plaintiff's emotional distress claims. EL AL cross-appealed pursuant to 28 U.S.C. § 1291, seeking to vacate the property damage award on the basis that the award improperly failed to uphold the fraud standard expressly prescribed by Article 26(4) of the Convention.

On appeal, the Second Circuit held that: (1) plaintiff's personal injuries were not the result of an "accident" within the meaning of Article 17 of the Convention; (2) the Warsaw Convention does not exclusively govern *all* of plaintiff's claims, *i.e.*, the Convention applied to plaintiff's property damage but not her personal injury claims; and (3) plaintiff is entitled to seek recourse under state law for her personal injury claims. The decision, entered June 13, 1997, reversed and remanded the District Court judgment with respect to plaintiff's personal injury claims and affirmed without comment the property damage award. A motion to recall and stay the mandate (issued July 8, 1997) was granted September 8, 1997.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted to resolve a direct conflict among the Second, Third and Fifth Circuit Courts of Appeals as to whether the Warsaw Convention, a treaty of the United States, exclusively governs and precludes state law causes of action for a passenger's injuries sustained in the course of "international transportation" if the injuries were not caused by an "accident" within the meaning of Article 17 of the Convention.

At issue is the exclusive applicability of the Warsaw Convention to personal injury claims sustained in the course of "international transportation" by air which are not caused by an "accident" under Article 17. In this case, the court below concluded that, because the security search of passenger Tseng did not constitute an "accident" (App. 12a), the injuries arose "outside" the Convention even though plaintiff indisputably was in the course of embarkation. App. 23a. The court below thus was able to conclude that plaintiff's state law claims are not precluded by the Warsaw Convention. *Id.*

The basic error of the court below was its determination that the Convention does not apply if a passenger's alleged injuries are not caused by an Article 17 "accident." The decision begins with the faulty premise that Article 17 must "apply" for the Convention to govern a passenger's claims, fails to read the express language of the Warsaw Convention as a whole and rests on a mistaken understanding of the historical basis for the Convention.

It is important to resolve the issues raised in this petition because of the clear and present conflict which exists among the Circuits. *See Tseng v. EL AL Israel Airlines, Ltd.* (Second Circuit); *Potter v. Delta Air Lines*,[3] (Fifth Circuit); *Abramson v. Japan Airlines Co. Ltd.*,[4] (Third Circuit); *see also Krys v.*

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[3] 98 F.3d 881 (5th Cir. 1996).

[4] 739 F. 2d 130 (3d Cir. 1984), *cert. denied*, 430 U.S. 1059 (1985).

Lufthansa German Airlines,[5] (Eleventh Circuit). The House of Lords of the United Kingdom, the court of last resort of a sister signatory to the Convention, recently addressed Articles 17 and 24 of the Convention in *Abnett v. British Airways plc*.[6] Lord Browne-Wilkinson, for the court, concluded: "I see no escape from the conclusion that, where the Convention has not provided a remedy, no remedy is available." App. 65a.

The issues presented by this certiorari petition transcend the facts of this case and have universal applicability to all claims arising out of "international transportation" by air. The Court has twice declined to address the issue of the exclusivity of the Convention. App. 14a, *citing*, *Eastern Air Lines v. Floyd*, 499 U.S. 530, 553 (1991) ("The Court of Appeals did not address this question [of exclusivity] and we did not grant certiorari to consider it. We therefore decline to reach it here."); *Air France v. Saks*, 470 U.S. 392, 408 (1985) ("Expressing no view on the merits of this contention [that the passenger can seek recourse under state law], we note that it is unclear from the record whether the issue was raised in the Court of Appeals.") Unless resolved by the Court, international passengers' rights and remedies with respect to air carriers will remain unsettled. The Court should resolve the exclusivity issue to ensure the clear and consistent application of the terms of a treaty to which the United States is a party.

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[5] ___ F.3d ___, No. 96-4430, 1997 WL 450150 (11th Cir. Aug. 25, 1997).

[6] [1997] 1 All E.R. 193 (H.L. 1996) (U.K).

I

CERTIORARI SHOULD BE GRANTED TO RESOLVE A DIRECT CONFLICT AMONG DECISIONS OF THE CIRCUIT COURTS OF APPEALS AND TO ENFORCE THE EXPRESS LANGUAGE OF A TREATY TO WHICH THE UNITED STATES IS A PARTY

The Court has granted certiorari in the past to ensure the correct interpretation and application of the Warsaw Convention. *Chan v. Korean Air Lines*, 490 U.S. 122 (1989).[7] The Court should grant certiorari in this case to provide a clear pronouncement as to the scope of the Convention. Just as an "adequate notice" requirement could not properly be read into the Convention based on the premise that courts have generally read such a requirement into the Convention (*Chan*, 490 U.S. at 134 n. 5), a right of recourse under state law should not be read into Article 17 based on the premise that some courts have read such a right into this treaty.

The Court, in *United States v. Belmont*, 301 U.S. 324 (1937), recognizing that the provisions of a treaty are exclusive of all local laws on the subject matter dealt with by the treaty, held:

> In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any

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[7] The Court's decision in *Chan* resolved the conflict between the Second and Fifth Circuits and the District of Columbia Circuit as to the correct interpretation of Article 3 of the Convention.

> of them can be interposed as an obstacle to the effective operation of a federal constitutional power.

301 U.S. at 331-32.

As Justice Scalia confirmed in *Chan*, "we must be governed by the text." 490 U.S. at 134. The Court should resolve the present conflict among the circuits because denial of certiorari would permit further judicial intrusion into the subject matter of this treaty and perpetuate the conflict.

In 1984, the Court of Appeals for the Third Circuit ruled in *Abramson* that the district court erred in failing to address state law causes of action after concluding that the passenger's injuries "[did] not constitute an 'accident' " under Article 17. 739 F.2d at 133. The Court denied Japan Airlines' certiorari petition.

Twelve years later, the Court of Appeals for the Fifth Circuit squarely held in *Potter* that Article 17 creates the exclusive cause of action and the exclusive remedy for all claims arising out of "international transportation" by air. The Fifth Circuit's decision in *Potter* resulted in a direct conflict between the Third and Fifth Circuits with respect to the issue of exclusivity, but the plaintiff in *Potter* did not seek certiorari.

The Fifth Circuit in *Potter*, unlike the court below (App. 15a), upheld the preemptive scope of Article 24(2). The Fifth Circuit stated:

> Mrs. Potter thus reads the preemption language in article 24(2) to prohibit state law causes of action only where a claim has been adjudicated an "accident" and deemed compensable under the Warsaw Convention. We disagree.

98 F.3d at 884 (footnotes omitted).

The decision below reaffirmed the live and direct conflict between the decisions of the Third and Fifth Circuits as to the proper interpretation of the Warsaw Convention and affords

the Court a ripe opportunity for review of this important issue.

The court below noted that the Supreme Court has not answered the question whether a plaintiff denied a remedy under Article 17 of the Convention may pursue recovery for those injuries under state law. App. 2a. In the absence of such guidance, the court below elected to apply *dictum* from its decision in *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267, 1271 (2d. Cir.), *cert. denied*, 502 U.S. 920 (1991), to conclude that a plaintiff may seek recovery under state law when recovery is not permitted under the Warsaw Convention. App. 15a. The court below, accordingly, held that, because plaintiff's injuries were not the result of an Article 17 "accident," she was entitled to seek recovery under state law. App. 23a.

The decision below starts with the faulty premise that "the terms of the Convention do not apply" *unless* there is an Article 17 "accident." App. 7a; *see also* App. 8a ("Article 17 applies where . . . "); App. 10a ("the term 'accident' has been held not to apply"). Unlike the Fifth Circuit, the Second Circuit found that the preemptive language found in Article 24 applies only where there is an "accident" under Article 17. App. 15a-16a. The Second and Fifth Circuits also disagree as to whether the Convention's goal of uniformity is feasible and sufficiently compelling to supplant state law with respect to the issue of liability of the air carrier. *See Potter*, 98 F.3d at 885; App. 21a.

Two (2) months after the lower court's decision in this case, the Eleventh Circuit in *Krys* concluded that plaintiff's damages from an in-flight heart attack were not caused by an "accident" under Article 17 and permitted plaintiff to seek recovery under state law. The Eleventh Circuit, acknowledging the clear conflict among the Circuits, declined to address the issue of exclusivity, which it concluded had not

been preserved in that case. *Krys*, 1997 WL 450150 at n.8 *comparing Abramson* and *Tseng* with *Potter*.

The decisions addressing Articles 17 and 24 are in clear conflict as to the proper interpretation and application of this treaty. Review by the Court is necessary to resolve this conflict and to prevent similar confusion in the future.

II

THIS CASE RAISES RECURRING, IMPORTANT AND UNRESOLVED QUESTIONS INVOLVING THE CORRECT INTERPRETATION OF A TREATY OF THE UNITED STATES

Review of the decision below is appropriate in order to settle recurring, significant issues concerning the breadth of application of this treaty.

A. The Issue of Exclusivity is Repeatedly Addressed by the Courts

As a treaty of the United States, the Warsaw Convention is the supreme law of the land. U.S. Const. art. VI, cl. 2.; *Chan*, 470 U.S. 392. The court below nevertheless declined to apply the Convention's liability provisions to plaintiff's personal injury claims because she is not entitled to any recovery under the Convention. The court below based its decision on its conclusion that the Convention does not preclude claims based on state law so long as recovery for such claims is not expressly provided for in the Convention. App. 20a.[8] The fre-

[8] The court below also rationalized its decision, in part, on the erroneous conclusion that the Convention was drafted to protect the "fragile fledgling [airline] industry." App. 22a. The drafting history of the Convention reflects the drafters' compromise with respect to passengers, between no liability and imposing unlimited liability, and was recognized by the French delegate who noted:

> Those who did not participate in the work of the CITEJA and who read this article [22] can imagine that it creates a favorable system

quency with which federal courts must address the issue of the exclusivity of the Warsaw Convention and its inconsistent interpretations is demonstrated by the *Potter* decision, rendered two (2) weeks prior to the oral argument of this case in the court below, and the *Krys* decision, rendered two (2) months after the decision below.

Moreover, the issue whether the Warsaw Convention exclusively governs a plaintiff's claims arising out of "international transportation" has not been limited to the *Abramson*, *Potter*, *Tseng*, and *Krys* decisions. Every time a summons and complaint is issued against an air carrier seeking damages arising out of "international transportation," the carrier now must assess its liability exposure to the passenger dependent on the jurisdiction in which the summons was issued and whether the plaintiff has artfully pleaded his allegations in an attempt to avoid the potentially limited right to, or amount of, recov-

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in favor of the carrier. They say: Why not apply the common law to him?

Well, in reality, this Convention creates against the air carrier an exceptional system, because in the majority of the countries of the world, contracts of carriage are concluded under a system of free contract. The carrier is free to insert in the contract clauses which exclude or reduce his liability, as much for goods as for travelers. You are of course aware that they have lost no opportunity to do so, and presently many air carriers operate under this unregulated contractual system, and, in practice, in fact they are not liable.

One has desired to impose upon them a compulsory system of liability . . . [I]t was natural not to impose on them common law liability. It's in the spirit of compromise that one has said: All that can be asked from the air carrier is to take reasonable measures to avoid the damage, to have his aircraft in good flying condition, and to make sure that they are well flown.

Second International Conference on Private Aeronautical Law Minutes (Warsaw, 1929) (R. Horner & D. Legrez trans. 1975) at 47-48; *see also Id.* at 213 (British delegate noted that Article 24 "excludes recourse to common law"); *Id.* at 65 (Italian delegate emphasized that "recourse to national law must be ruled out").

ery under the Warsaw Convention. *See Potter*, 98 F.3d at 896.[9]

The Court has twice declined to address the issue of the exclusivity of the Convention. App. 14a, *citing, Eastern Airlines v. Floyd*, 499 U.S. 530, 553 (1991); *Saks*, 470 U.S. at 408. Accordingly, the scope of the Convention remains undefined and inconsistently applied. The resulting inconsistent application of the Convention is particularly troubling in light of its expressed goals of uniformity and certainty. The court below declined to uphold the interest of uniformity on the ground that "such a goal has not always been found feasible in all areas of international travel." App. 21a. The court below cited *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996), for the proposition that "the Convention expresses no compelling interest in uniformity that would warrant . . . supplanting an otherwise applicable body of law, here state law." *Id. Zicherman*, however, addresses the issue of the *measure* of recovery under the Convention, which this Court specifically

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[9] *See also Garcia v. Aerovias de Mexico*, 896 F. Supp. 1216 (S.D. Fla. 1995); *Alvarez v. Servicios Aereos de Honduras*, 24 Av. Cas. (CCH) 17,888 (S.D. Tex. Jan. 11, 1994); *Luna v. Compania Panamena De Aviacion*, 851 F. Supp. 826 (S.D. Tex. 1994); *Jack v. Trans World Airlines*, 820 F. Supp. 1218 (N.D. Cal. 1993); *Velasquez v. Aerovias Nacionales de Colombia*, 747 F. Supp. 670 (S.D. Fla. 1990). *Contra De Estenssoro v. American Jet*, 944 F. Supp. 813 (C.D. Cal. 1996); *Campos v. Sociedad Aeronautica De Medillin Consolidada*, 882 F. Supp. 1056 (S.D. Fla. 1994); *Pittman v. Grayson*, 869 F. Supp. 1065 (S.D.N.Y. 1994); *Walker v. Eastern Air Lines*, 775 F. Supp. 111 (S.D.N.Y. 1991), *reargument denied*, 785 F. Supp. 7168 (1992); *Rhymes v. Arrow Air*, 636 F. Supp. 737 (S.D. Fla. 1986); *Alvarez v. Aerovias Nacionales de Colombia*, 756 F. Supp. 550 (S.D. Fla. 1991).

State courts also apply inconsistent interpretations of the Convention. *Compare Cortes v. Delta Air Lines*, 638 So. 2d 108 (Fla. 3d D.C.A. 1994) ("plaintiff had attempted to put the liability cart before the jurisdictional horse") *with Koehler v. Scandinavian Airlines System*, 674 N.E.2d 112 (Ill. App. 1 Dist. 1996) (court refused to address jurisdictional requirements of Article 28 because there was no Article 17 "accident"), *leave to appeal denied*, 677 N.E.2d 966 (Ill. 1997).

found had been intended by the drafters to be a matter of each state's law. 116 S. Ct. at 634 (Article 17 leaves to domestic law what passengers "may be compensated for"). The treaty's goal of uniformity, however, should be upheld with respect to the fundamental issue of liability.

The conflict between the Second and Fifth Circuits is evidenced in the Fifth Circuit's foreshadowing of the dangers associated with disregarding the Convention's goal of uniformity:

> The Convention's express limitation on individual recovery of $75,000, see article 22(1), would be circumvented entirely, and airlines would be subject to distinct choice of law rules and substantive law provisions depending upon the forum in which suit was brought. . . . [P]laintiffs, if permitted to file state law causes of action, could forum-shop for jurisdictions with friendly substantive laws on recovery of damages for personal injury and thus could undermine the Convention's goal of uniformity. Plaintiffs could plead artfully their complaints to avoid characterizing the damages as resulting from an "accident," thereby creating an opt-out from the Convention's liability constraints.

Potter, 98 F.3d at 886 (footnote omitted).

Furthermore, the Second and Fifth Circuits expressly disagree on the proper application of the Court's decision in *Zicherman*. The Fifth Circuit points out that the drafters of the Convention expressly provided when state law should apply. *See Potter*, 98 F.3d at 886 ("where the drafters of the Convention concluded that uniformity could not be achieved, they provided expressly for recourse to local law"), *citing*, *Zicherman*, 116 S. Ct. 629. In contrast, the court below concluded:

> We have read *Zicherman* to instruct specifically that the Convention expresses no compelling interest in unifor-

> mity that would warrant us in supplanting an otherwise applicable body of law, here state law.

App. 21a.

To avoid the perhaps harsh result that a passenger injured in the course of "international transportation" may not be entitled to any recovery under the Convention, the decision of the court below has effectively subordinated the supreme law of the land to the common law of the several states.

B. The Decision Below Conflicts With a Decision of the Court of Last Resort of a Sister Signatory to the Convention

In addition to the recurrent confusion and conflict among the courts of the United States over the proper interpretation of the Convention, the decision of the court below conflicts with the decision of a sister signatory to the Warsaw Convention. In December 1996, the House of Lords resolved the issue of exclusivity for actions brought in the United Kingdom in *Abnett v. British Airways plc*.[10] The House of Lords upheld the exclusivity of the Warsaw Convention and recognized that "it appears that the point is not settled in the United States as between circuits and even in some instances within the same circuit." App. 61a. The House of Lords further noted that "there was no clear or very consistent line of reasoning in these cases. . . in this area of international air law" and that "it was impossible to draw any clear conclusion as to the state of U.S. law. . . ." *Id.* The House of Lords, finding no guidance from the United States as to whether the

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[10] The construction of the Convention by sister signatories is "entitled to considerable weight." App. 19a (*quoting Saks*, 470 U.S. at 404). The decision of the House of Lords was brought to the attention of the court below pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure. The decision below makes reference to *Sidhu v. British Airways*, referring to the second action in the caption of the consolidated proceedings, which was an appeal from a decision by the English Court of Appeal. *Abnett* was the appeal from the Court of Session of Scotland.

Convention provides a passenger's exclusive right of recourse for injuries sustained during international air transportation, concluded: "As matters have developed it will ultimately be for the Supreme Court of the United States of America to offer guidance to the American judges on this issue. . ." App. 63a.

Disagreeing with the Third Circuit and the court below, the House of Lords concluded that Article 17 is intended to provide exhaustively for the circumstances under which a carrier may be liable for bodily injury. App. 55a; App. 18a.

C. The Warsaw Convention and the IATA Intercarrier Agreement Both Require Resolution of the Issue of Exclusivity

The decision below contains an erroneous balancing of the need to protect the passenger today and the air carrier of 1929, and makes reference to the effect of the International Air Transport Association Intercarrier Agreement on Passenger Liability (IATA Intercarrier Agreement) on the application of the Warsaw Convention to a passenger's bodily injury claims arising out of "international transportation."[11] App. 22a. The IATA Intercarrier Agreement "abandon[s] the Convention's liability cap and imposes[es] strict liability up to $145,000." App. 22a. The IATA Intercarrier Agreement also imposes presumptive liability for unlimited damages.[12]

The determination of a plaintiff's ability to recover under the new Intercarrier Agreement hinges on the finding of an

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[11] *International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention*, approved by D.O.T. Order 97-1-2, 1997 WL 4834 (D.O.T. Jan. 8, 1997).

[12] For a detailed, informative discussion of the IATA Intercarrier Agreement *see* Desmond T. Barry, Jr. and Thomas J. Whalen, *Unlimited Liability: The New Ball Game in International Transportation by Air*, 64 DEF. COUNS. J. 381 (July 1997).

Article 17 "accident." Absent resolution of the issue of Warsaw Convention exclusivity, the issue will remain unresolved as to whether a finding that an injury was not the result of an Article 17 "accident" (1) enables a passenger to seek recovery under common law, or (2) precludes a plaintiff from seeking any recovery from the carrier. A definitive interpretation of the Convention's scope is critical to the determination whether an air carrier has presumptive liability or, possibly, no liability under the Warsaw Convention, as modified by the Intercarrier Agreement.

D. The Court Should Apply the Rule of Strict Treaty Construction to the Written Notice Provisions Prescribed By Article 26 of the Convention

The proper application of the express written notice of claim provisions set forth in Article 26 also is a significant issue of treaty interpretation. Despite Article 26(4), which expressly provides that "no action shall lie against the carrier, save in the case of fraud on his part," the court below implicitly rewrote the terms of this treaty when it failed to overturn plaintiff's baggage damage award. The court below should have addressed the district court's failure to uphold the express fraud standard necessary to overcome the written notice of claim provisions prescribed by Article 26.

It is undisputed that failure to provide a carrier with timely written notice bars a plaintiff's claim for damages with respect to baggage or cargo absent a showing of fraud. Plaintiff does not dispute that she did not provide written notice of her claim to EL AL (alleging that various items in her baggage were missing or had been damaged) until 40 days after her flight. The court below should have enforced Article 26(4) because the evidence did not rise to the requisite level of fraud so as to circumvent the Article 26 express written notice provisions.

In *Chan*, Justice Scalia clearly stated:

> We must thus be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history that petitioners and the United States have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous. But where the text is clear, as it is here, we have no power to insert an amendment. . .

490 U.S. at 134 (citation omitted).

In this case, Articles 26(2), (3) and (4) are unambiguous. Because plaintiff failed to provide timely written notice of her baggage claim. Article 26 permits no recovery from EL AL unless plaintiff proves the requisite elements of fraud. Plaintiff Tseng's trial testimony failed to meet the fraud standard required by Article 26(4). The Court should apply the rule of strict treaty construction to Article 26, as it did in *Chan*, to ensure that the courts of the United States do not engage in further judicial treaty making on this issue. Courts should not be free to reduce the fraud standard set forth in Article 26(4) to avoid its terms. Contrary to the express terms of the Warsaw Convention, the decision of the court below upholds the "right" of every shipper or consignee making a cargo claim and every passenger making a baggage claim to disregard a clear and unambiguous prescription set forth in this treaty.

In summary, the court below has incorrectly decided recurring, important questions of treaty law on which the courts of the United States are in disarray. The proper interpretation of this treaty, which is a matter of importance to the courts, to EL AL and all other international air carriers and to the travelling public, should be reviewed and settled by the Court in order to ensure the uniform and proper application of this treaty and to end the conflict among the Second, Third and Fifth Circuit Courts of Appeals.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 10, 1997

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 331, 857—August Term, 1996

(Argued November 20, 1996 Decided June 13, 1997)

Docket Nos. 96-7447, 96-7619

TSUI YUAN TSENG,

Plaintiff-Appellant-Cross-Appellee,

—v.—

EL AL ISRAEL AIRLINES, LTD.,

Defendant-Appellee-Cross-Appellant.

Before:

NEWMAN, *Chief Judge,*
CARDAMONE and ALTIMARI, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Southern District of New York (Stanton, J.), following a bench trial, finding in favor of plaintiff on her claim of property damage and awarding

her $1,034.90, but dismissing plaintiff's claims for personal injury for failure to establish an injury cognizable under Article 17 of the Warsaw Convention.

Affirmed in part, reversed in part, and remanded.

ROBERT H. SILK, New York, New York (Silk, Bunks, & Suckle, P.C., New York, New York, of counsel), *for Plaintiff-Appellant*.

DIANE WESTWOOD WILSON, New York, New York (Debra A. Shields, Condon & Forsyth, New York, New York, of counsel), *for Defendant-Appellee*.

CARDAMONE, *Circuit Judge*:

We have two issues to resolve on this appeal. One relates to the meaning of the term "accident" under Article 17 of the Warsaw Convention. The second, and by far more elusive, is whether a plaintiff denied a remedy for alleged injuries under the Convention because it does not apply may then pursue a claim for the same injuries in state court. The Supreme Court has not answered this question, and our search for the correct answer is somewhat reminiscent of Sir Galahad's search for the "Holy Grail." But unlike that Crusader who, pressing on, left the plain and climbed the height,[1] we must toil in the

[1] So pass I hostel, hall, and grange;
By bridge and ford, by park and pale,

valley, examining the Convention's language, its drafting history, decisional law and the thoughts of scholarly commentators.

Plaintiff Tsui Yuan Tseng (plaintiff or appellant) appeals from a judgment entered in the United States District Court for the Southern District of New York (Stanton, J.) that awarded her $1,034.90 for damages against defendant El Al Israel Airlines, Ltd. (El Al) for loss of her baggage, but dismissed her personal injury claim against the same defendant for failure to establish a cognizable injury.

Tseng alleged that El Al caused her to suffer personal injuries when it subjected her to a security search prior to her boarding an El Al flight from New York to Tel Aviv, Israel, and that the airline damaged and/or lost some of her personal belongings while searching her luggage. The district court ruled that the carrier's conduct constituted an "accident," giving rise to liability under Article 17 of the Warsaw Convention,[2] but that Tseng was barred from recovery because the only injuries she alleged were psychological and emotional, not physical.

BACKGROUND

Tseng, a New York resident employed by Beth Israel Medical Center, went on May 22, 1993 to John F.

All-arm'd I ride, whate'er betide,
Until I find the Holy Grail.

Alfred Lord Tennyson, *Sir Galahad*, *in* The Poetic and Dramatic Works of Alfred Lord Tennyson 101, 101 (W.J. Rolfe ed., Cambridge ed. Houghton, Mifflin & Co. 1898).

[2] Convention for Unification of Certain Rules Relating to International Transportation by Air, *concluded* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 40105 note.

Kennedy International Airport in New York where she was scheduled to take El Al Flight LY-008 to Tel Aviv. Upon arrival, she proceeded to El Al's terminal, presented her ticket and U.S. passport to an El Al security guard, entered the terminal building and proceeded to a security area, where she was asked routine questions regarding her destination. Based upon her responses, which the security guard considered illogical—no explanation of why they were considered so is in the record—Tseng was classified as a "high risk" passenger.

Pursuant to the airline's security procedures, plaintiff was taken to a private room where she was subjected to a security search for explosives or detonating devices. The term "security search" refers to an intrusive search of a passenger's body initiated after a routine check by metal detector and questioning have led airline personnel to deem a passenger a security risk. Tseng was told to remove her shoes, jacket and sweater, and then instructed to lower her blue jeans to mid-hip level. A female security guard proceeded to search Tseng's entire body manually, including her breasts and groin area. The search, conducted outside Tseng's clothing, lasted 15 minutes. Security guards also searched Tseng's baggage. The security search of Tseng and her baggage conformed to El Al procedures, which had been adopted pursuant to Federal Aviation Administration regulations.

Following the search, El Al decided that Tseng did not present a security risk after all and she was permitted to board her flight. Plaintiff testified that, as a result of defendant's search, she "was really sick and very upset" during the course of the flight, and "emotionally traumatized and disturbed" throughout her month-long trip to Israel and thereafter. Subsequently, she underwent medical and psychiatric treatment; but, at no time did

Tseng claim she suffered any physical injury as a result of the bodily search.

During the flight plaintiff was unable to locate several personal items she had in her carry-on bag, and, upon arriving in Tel Aviv, she was missing, among other things, $1000 in cash and a diamond Rolex watch. Tseng did not inquire about the lost items during her flight or upon landing in Tel Aviv. However, while at the Tel Aviv airport she did inquire about her camera, which had been confiscated at JFK to be X-rayed. When plaintiff arrived at her hotel, she telephoned the airline's Tel Aviv office to inquire about the camera and the other missing items. She testified that an El Al representative informed her that she must take care of the matter in New York, and that the airline was "not interested in [her] missing items." On July 1, 1993, having returned from her trip, Tseng provided written notice to El Al's New York office that several items that accompanied her to the El Al Terminal for departure on her trip were either missing or damaged.

Since she did not obtain a satisfactory response, plaintiff initiated the action giving rise to this appeal by filing a complaint in May 1994 in the New York State Supreme Court for New York County. The complaint alleged a state law personal injury claim arising from the assault and false imprisonment; it also asserted a property claim relating to her lost and/or damaged property. El Al removed the case to federal court pursuant to 28 U.S.C. § 1441(d), because El Al is a "foreign state" within the meaning of 28 U.S.C. § 1603(a), which provides that "[a] 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state."

In federal court, El Al argued that plaintiff's action was governed by the Warsaw Convention. The district court agreed, ruling it applicable because the airline's search of plaintiff constituted an "accident" within the meaning of Article 17. In applying the Convention, the trial court found the carrier liable under Article 18 for the loss and damage to Tseng's carry-on and checked baggage, and awarded her $1,034.90. The property loss award was calculated under Articles 22(2) and (3) of the Convention, which limit recovery for checked baggage to 250 francs per kilogram of baggage, and limit recovery for carry-on baggage to 5000 francs per person. These amounts have been converted to $20 per kilogram, or $9.07 per pound, for checked baggage and $400 per passenger for carry-on luggage. *See* 14 C.F.R. § 221.176(a); Warsaw Convention Liability Limitations, 39 Fed. Reg. 1526 (1974). Because the weight of Tseng's baggage could not be determined, the district court used the maximum weight allowed by El Al for checked baggage—70 pounds—to make its calculation. Tseng's personal injury claim was dismissed because she failed to show a physical injury as required by Article 17.

Plaintiff appeals the dismissal of her personal injury claim and El Al cross-appeals from the property damage award. We affirm, in part, and reverse, in part, and remand to the district court for further proceedings.

DISCUSSION

We are presented with two issues of considerable import. First, we must determine whether the security search of a passenger initially suspected of presenting a possible risk of terrorism but who is later determined not to present a danger constitutes an "accident" within the

meaning of Article 17 of the Warsaw Convention. Second, if the answer to the first question is "no," we must then determine whether the Convention provides the exclusive avenue for recovery of injuries sustained during international air travel even in cases where the terms of the Convention do not apply and it does not therefore subject the carrier to liability for damages.

Because there are a number of decisions setting forth the basic structure of the Convention—a comprehensive overview of it is set forth in *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1270-71 (2d Cir. 1991) [*Lockerbie I*]—we discuss it only insofar as necessary to the resolution of the issues before us.

I Article 17

A. *Definition of "Accident"*

Tseng maintains it was error to dismiss her personal injury claims for want of a cognizable injury. The district court ruled that a security search of a passenger based upon suspicion of circumstances that turned out not to involve any danger constitutes an accident, subjecting the carrier to liability under Article 17. Carrier liability for personal injuries sustained by passengers engaged in international air travel is governed by Article 17 of the Convention, which states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 17 applies where (1) an accident has occurred, in which (2) a passenger suffered death, wounding, or any other bodily injury, and (3) the accident occurred either on board the aircraft or in the course of embarking or disembarking from the plane. *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535-36 (1991). All three of these requirements must be met to invoke Article 17 liability. If a passenger satisfies the requirements for Article 17 liability, the amount of that liability was once limited to $75,000, *see In re Air Disaster at Lockerbie Scotland*, 37 F.3d 804, 812 (2d Cir. 1994), but 77 international carriers recently agreed to eliminate the $75,000 liability cap and impose strict liability up to 100,000 Special Drawing Rights (SDRs), roughly equivalent to $145,000, *see International Air Transport Association Intercarrier Agreement on Passenger Liability, approved by* D.O.T. Order 96-11-6, 1996 WL 656334 (D.O.T. Nov. 12, 1996). *See* DOT Approval Allows Liability Limits to be Abolished, Air Safety Wk., Nov. 18, 1996. However, a plaintiff may not recover for purely psychic injuries. *See Floyd*, 499 U.S. at 552.

Although the Convention does not define the term "accident," the Supreme Court describes it as "an unexpected or unusual event or happening that is external to the passenger." *Air France v. Saks*, 470 U.S. 392, 405 (1985). Yet "not every identifiable incident or occurrence during a flight is an accident within the meaning of Article 17 even if the incident or occurrence gives rise to an injury." *Quinn v. Canadian Airlines Int'l Ltd.*, No. 35558/91U, 1994 Ont. C. J. LEXIS 1695, at *10 (Ct. Just. May 30, 1994) (air turbulence not an accident); *see Pflug v. Egyptair Corp.*, 961 F.2d 26, 28-29 (2d Cir. 1992) (hijacking is an accident).

Thus, "accident" does not include those typical events that a passenger may be presumed to have accepted, that is to say, those injuries occurring in the normal operation of the aircraft or the airline are not injuries caused by "accidents" under Article 17. *See Saks*, 470 U.S. at 406; *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 133 (3d Cir. 1984); *Salerno v. Pan American World Airways, Inc.*, 606 F. Supp. 656, 657 (S.D.N.Y. 1985). Rather, it is only those unexpected "risks characteristic of air travel" that may occur during flight or in the course of embarking or disembarking and that are external to the passenger which may be called "accidents." *See Curley v. American Airlines, Inc.*, 846 F. Supp. 280, 283 (S.D.N.Y. 1994); *see also* Daniel Goedhuis, *National Airlegislations and the Warsaw Convention* 200-01 (1937). A "risk characteristic of air travel" is one that is to some extent unique to air travel, or to which carriage by air is peculiarly susceptible. *See Martinez Hernandez v. Air France*, 545 F.2d 279, 284 (1st Cir. 1976) ("[W]e think the risk of a random attack such as [a terrorist attack inside the baggage claim area] is not a risk characteristic of travel by aircraft, but rather is a risk of living in a world such as ours.").

At the time of the Convention's drafting, the delegates to the Warsaw conference understood "accident" to apply primarily to air disasters such as plane crashes. *See Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 37-38 (2d Cir. 1975); *Second International Conference on Private Aeronautical Law: Minutes* 52 (Robert C. Horner & Didier Legrez trans., 1975) [hereinafter *Minutes*] ("[O]ne can classify aircraft accidents in three categories: those which arise out of errors of piloting; those which arise out of defect in the functioning of the aircraft[;] and those which are designated as being the

result of an Act of God, which is the majority of cases.").

"Since 1929, the risks of aviation have changed dramatically in ways unforeseeable by the Warsaw framers." *Day*, 528 F.2d at 37. As a result, courts regularly have viewed as "accidents" such events as terrorist attacks, *see, e.g., id.* at 37-38, hijacking, *see, e.g., Pflug*, 961 F.2d at 29; *Haddad v. La Compagnie Nationale Air France SA* [1981] E.C.C. 207 (CA Paris 1979), and bomb threats, *see, e.g., Margrave v. British Airways*, 643 F. Supp. 510, 512 (S.D.N.Y. 1986); *Salerno*, 606 F. Supp. at 657. On the other hand, the term has been held not to apply in instances such as death of a passenger by natural causes, *see, e.g., Walker v. Eastern Air Lines, Inc.*, 785 F. Supp. 1168, 1170 (S.D.N.Y. 1992), fights between passengers, *see, e.g., Price v. British Airways*, No. 91 Civ. 4947, 1992 WL 170679, at *3 (S.D.N.Y. July 7, 1992), routine repressurization of the aircraft, *see, e.g., Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400, 413 (E.D. Pa. 1977), or injuries resulting from intoxication, *see, e.g., Padilla v. Olympic Airways*, 765 F. Supp. 835, 838 (S.D.N.Y. 1991).

Given the near absolute liability now imposed by the Convention once an accident is found to have occurred, we invoke its provisions with some degree of care, reading its terms strictly and construing them narrowly. *See McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 316 (1st Cir. 1995) (Article 17 should be read parsimoniously because "there are sound policy reasons to confine . . . liability to the letter of the text, narrowly construed.").

B. *Security Search Not an "Accident"*

We turn now to consider whether the security search of Tseng was an accident under Article 17. Several reasons lead us to part from the district court, which thought it was. In the first place, being subjected to a personal search is a distasteful but common incident of international air travel. As such, it cannot be considered "unexpected" or "unusual," regardless of a passenger's subjective reaction to it. Or, as we just stated, not every incident occurring during a flight or in the process of embarking or disembarking is an "accident" within the meaning of Article 17. As one commentator explained:

> the passenger . . . is aware of the *typical events* related to an air carriage (turbulence, bad-weather, flashes of lightning onto the plane's hull, changes in cabin pressure, dry air in the cabin, so called 'air pockets', more or less 'hard' landings, etc.) and cannot realistically exclude the possibility of such occurrences happening on his flight, so he accepts them.

Elmar Giemulla et al., *Warsaw Convention* art. 17, para. 12 (Bernd Wickert-König trans., 1995).

Security clearance of one degree or another is part of every passenger's experience. And, a search of a passenger may not be said today to be an atypical event in international air travel. Each passenger must routinely submit to a metal detector and interrogation. Not infrequently, these initial procedures lead to additional measures, such as the use of a metal detecting wand or a security search. These events are an anticipated aspect of international travel. Whether appellant expected to be subjected to a security search is not a relevant consideration because she reasonably should have been aware that she might be.

A second reason that the subject search was not an "accident" is because it was part of the airline's normal procedure. Every air carrier is required by Federal Aviation Administration regulations to have in place security procedures to prevent terrorist attacks and to deny transport to anyone who does not consent to be searched upon request. *See* 14 C.F.R. § 129.25(b), (g)(1)-(2). As part of these security procedures, carriers are required to screen all passengers and baggage prior to boarding. *See* 49 U.S.C. § 44901(a) (requiring screening of passengers); 49 U.S.C. § 44906 (applying standards to foreign air carriers); 14 C.F.R. § 108.9(a). In accordance with these requirements, El Al conducts security searches of passengers daily. For example, in 1993 it conducted two to four security searches a day. Hence, as in *Saks*, this case appears simply to involve Tseng's personal reaction to the routine operating procedures of the defendant airline.

A further reason we cannot conclude that this incident was an "accident" within the terms of the Convention is because the Convention does not aim to derogate from the efforts of international air carriers to prevent violence and terrorism, efforts which are widely recognized and encouraged in the law. *See, e.g.*, 49 U.S.C. § 44901(a); 49 U.S.C. § 44906; *Day*, 528 F.2d at 34, 37 n.18 (recognizing the goal of accident prevention); 14 C.F.R. § 108.9(a) (screening utilized to "prevent or deter the carriage aboard airplanes of any explosive, incendiary, or a deadly or dangerous weapon").

Inherent in any effort to detect malefactors is the risk that innocent persons will be subjected to scrutiny and inconvenience. *Cf. Anderson v. Creighton*, 483 U.S. 635, 641 (1987) ("[I]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly con-

clude that probable cause is present . . . ."). This is especially true in airports, where security personnel have only brief interaction with passengers, and must rely on such investigative tools as risk profiles, as was the case here, because there is insufficient time to conduct a more extensive investigation. The inconvenience and embarrassment to the individual passenger of being erroneously searched, therefore, is the price passengers pay for the degree of airline safety so far afforded them. To this end, courts have recognized that airport security officials are to some extent freed from the exacting requirements typically attached to governmental searches of individuals. *See, e.g., United States v. Bell*, 464 F.2d 667, 675 (2d Cir. 1972) (Friendly, C.J., concurring); *New York v. Waring*, 174 AD2d 16, 19 (App. Div. 2d Dep't), *appeal denied*, 79 NY2d 1009 (1992). To suppose the drafters of the Convention aimed to impose close to absolute liability on air carriers for searches that disclosed no danger seems to us highly unlikely.

Our final reason deals with appellant's misapprehension regarding two Articles of the Convention. Tseng appears to assert that El Al's conduct is "wilful misconduct" covered under Article 25 and therefore the carrier's actions cannot constitute an "accident" within the meaning of Article 17. Plaintiff's view is based upon a misunderstanding of the Convention. The two articles are not mutually exclusive; rather the finding of an "accident" under Article 17 is a prerequisite to the imposition of any liability for the personal injuries of a passenger. *See Saks*, 470 U.S. at 396; *MacDonald v. Air Canada*, 439 F.2d 1402, 1404 (1st Cir. 1971). Article 25 simply describes a subset of "accidents" that are more egregious and to which a greater degree of culpability attaches.

In sum, from the above authorities, we derive the following: a carrier is liable in damages for an accident on board the aircraft or in the course of embarking or disembarking that causes the death or wounding or any other bodily injury of a passenger. An "accident" is an unexpected or unusual event that is external to the passenger; but, "accident" does not include those typical occurrences that a passenger is presumed to accept as a characteristic risk of air travel. As a consequence, we hold that even though the event of which plaintiff complains occurred during the course of her embarkation on defendant's airplane, there was no accident and she suffered no bodily injury. Hence, under the terms of Article 17 of the Warsaw Convention, El Al may not be held liable in damages to her.

II The Exclusivity of the Convention

A. *State Cause of Action Lies When Convention Inapplicable*

Having ruled that the search of Tseng does not constitute an "accident," we now must determine whether the Convention provides the exclusive remedy for personal injuries sustained in the course of international air travel, such that Tseng is precluded from pursuing her state law claims for false imprisonment and battery. This is an issue the district court did not decide because it determined the Convention was applicable. The Supreme Court has twice declined to address the exclusivity of the Convention where its terms are *inapplicable*. *See Floyd*, 499 U.S. at 553; *Saks*, 470 U.S. at 408.

In *Lockerbie I* we stated in dictum that "a plaintiff plainly may institute" "a state cause of action when the claim does not arise under the Warsaw Convention." 928

F.2d at 1273. With the issue now squarely before us, we reaffirm that proposition and hold that state law claims are not precluded by the Warsaw Convention where the event or occurrence giving rise to the injury is found to be outside the Convention.

1. Convention's Text

Support for this view is found in the text of the treaty and in the context in which the words in it are used. *See Floyd*, 499 U.S. at 534 (noting that treaty interpretation should begin with the text), *Saks*, 470 U.S. at 396-97 (same); *see also* Vienna Convention on the Law of Treaties art. 31, *open for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 63 Am. J. Int'l L. 875, 885 (1969). The exclusivity provision of the Convention is found in Article 24, which provides:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

The provision clearly states that resort to local law is precluded only where the incident is "covered" by Article 17, meaning where there has been an accident, either on the plane or in the course of embarking or disembarking, which led to death, wounding or other bodily injury, *see Floyd*, 499 U.S. at 535-36. To extend the scope of the Convention's exclusivity beyond that which it expressly provides would require rewriting Article 24

or Article 17, a task only the signatories to the Convention may undertake. *See Saks*, 470 U.S. at 406; *see also Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1027 (2d Cir. 1996) (the task of interpretation begins with the "literal language" of the treaty), *cert. denied*, 117 S. Ct. 959 (1997).

2. Drafting History

The plain meaning of Article 24 is also supported by reference to the drafting history, or *travaux preparatoires*, of the Convention. "[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943); *see also* Vienna Convention, *supra*, art. 32, *reprinted in* 63 Am. J. Int'l L. at 885 (it is appropriate to use supplementary materials to "confirm the meaning resulting from" a contextual reading of the treaty's plain language).

The *travaux preparatoires* indicate that national law was intended to provide the passenger's remedy where the Convention did not expressly apply. During the conference, the Czechoslovakian delegation proposed an additional article that read: "In the absence of provisions in the present Convention, the provisions of laws and national rules relative to carriage in each State shall apply." *Minutes*, *supra*, at 176. The intent of the proposed article was set forth in its proviso: "Provided that the case which arises was not provided for in the Convention, it's the common law which is applicable." *Id.* However, the Czechoslovakian delegation was satisfied that its concern was addressed and withdrew its proposal

when the title of the Convention was amended to refer to the unification of "*certain rules*," thereby indicating "the special nature of the Convention." *Id.* (emphasis added); *see id.* at 188. Other delegates assumed it beyond question that the Convention was nonexclusive where it did not apply. For example, when asked what law would be applicable to cases excluded from the Convention under Article 34 (experimental trials exception), the French delegate exclaimed that "[n]aturally" the common law would apply. *Id.* at 85-86.

B. *Other Decisional Law and Scholarly Comment*

Moreover, a number of courts and commentators have concluded that the Convention provides the exclusive remedy only where its provisions expressly apply. *See, e.g., Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 618 (7th Cir. 1989) (court reached plaintiff's state law claims after determining that the Convention was not implicated); *Abramson*, 739 F.2d at 134 ("if [the Convention] does not apply, it leaves liability to be established according to traditional common law rules"); *Martinez Hernandez*, 545 F.2d at 284; *Tandon v. United Air Lines*, 926 F. Supp. 366, 370-71 (S.D.N.Y. 1996); *Beaudet v. British Airways, PLC*, 853 F. Supp. 1062, 1072 (N.D. Ill. 1994) (state law negligence claim not pre-empted where Convention is inapplicable); *Levy v. American Airlines*, No. 90 Civ. 7005, 1993 WL 205857, at *5 (S.D.N.Y. June 9, 1993), *aff'd*, 22 F.3d 1092 (2d Cir. 1994); *Walker*, 785 F. Supp. at 1173 (S.D.N.Y.); *Fischer v. Northwest Airlines, Inc.*, 623 F. Supp. 1064, 1066 (N.D. Ill. 1985) (denying motion to dismiss state law claims, but dismissing Convention claims); *Rolnick v. El Al Israel Airlines, Ltd.*, 551 F. Supp. 261, 264 (E.D.N.Y. 1982) (permitting pursuit of state law claim after finding

passenger's slip on escalator not to have been within the Convention); Giemulla et al., *supra*, *Warsaw Convention* art. 1, para. 35 ("Where the Convention is not applicable, national law will be applied."); Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* 62 (1988) ("Where there is no 'accident' the Warsaw Convention is probably inapplicable and the passenger may proceed to use local law to prove a claim."); René H. Mankiewicz, *The Liability Regime of the International Air Carrier: A Commentary on the Present Warsaw System* 2, 13 (1981); Luis F. Ras, *Warsaw's Wingspan Over State Laws: Towards a Streamlined System of Recovery*, 59 J. Air L. & Com. 587, 589 (1994). *But see Potter v. Delta Air Lines, Inc.*, 98 F.3d 881, 885 (5th Cir. 1996) ("The Convention's goals of uniformity and certainty would be frustrated were we to allow Mrs. Potter to assert her state law claims, even where the Convention does not provide her a remedy."); *Salazar v. Mexicana Airlines*, 20 Av. Cas. (CCH) ¶ 17,114, at ¶ 17,115 (W.D. Tex. 1986) (same); *Sidhu v. British Airways plc* [1997] 1 All E.R. 193, 207 (H.L. 1996) (U.K.) (same).

C. *Contrary Arguments Refuted*

Two arguments have been advanced in support of the proposition that the Convention is wholly exclusive. We reject both. The first is a structural argument advanced in Great Britain. *See Sidhu* [1997] 1 All E.R. at 205-07. In the view of the English courts, Article 17 is intended to provide exhaustively for the circumstances under which a carrier may be held liable. *See id.* at 207. According to the House of Lords, the purpose of Article 17 is "to prescribe the circumstances, that is to say the only circumstances, in which a carrier will be liable in damages to the passenger for claims arising out of his

international carriage by air." *Id.* Interpreted in this fashion, the English courts read Article 24's reference to "cases covered under article 17" to mean those cases within the Convention not covered by Articles 18 (baggage) and 19 (delay), rather than to distinguish between incidents of personal injury that are or are not within the provisions of the Convention. *See id.*

We recognize that a construction of the Convention by our sister signatories is "entitled to considerable weight," *Saks*, 470 U.S. at 404, but remain unpersuaded to follow the course laid out in *Sidhu*. For one thing, the Convention is not an exhaustive set of rules and guidelines dealing with international air travel, as is evident from its formal title. As one commentator explained, "the Convention was not intended to govern the entire relationship between air carriers and passengers . . . , and does not propose to unify all such rules." Ras, *Warsaw's Wingspan*, *supra*, at 589; *see* Mankiewicz, *The Liability Regime*, *supra*, at 13, 91.

For another, neither the text nor the *travaux preparatoires* reveal an aim to provide in an exhaustive way for the liability of the carrier for all personal injuries. It is widely accepted that one of the two primary purposes of the Convention was to shield carriers from financial catastrophe following in the wake of a major accident. *See MacDonald v. Air Canada*, 439 F.2d at 1405; Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499 (1967). To that end, the Convention limits airline liability for accidents. But the Convention does not purport to insulate carriers from the ordinary risks of doing business, such as keeping their facilities in good repair. An injury to a passenger caused, for example, by a failure of a carrier to keep its walkways in

a safe condition is hardly the type of catastrophic incident that would likely force even a fledgling airline out of business, and cannot be assumed to have been within the contemplation of the drafters of the Convention.

Given the self-described limitation of the Convention, it seems illogical to extend its scope beyond that for which it explicitly provides.[3] It is not tenable to believe the Convention meant to address the more ordinary type of personal injury without some express statement in the text to that effect. Such reading would lead to the absurd result of allowing carriers to escape liability for their negligence—or even their intentional torts—so long as the event giving rise to the injury was not an accident occurring on an airplane or in the course of embarking or disembarking as narrowly circumscribed by the definition of Article 17's meaning.

For example, it is generally accepted that a passenger injured while riding an escalator in the airline terminal does not have recourse under Article 17. *See, e.g., McCarthy*, 56 F.3d at 317 (passenger's slip on escalator not in the course of embarking or disembarking); *Abu Hamdeh v. American Airlines, Inc.*, 862 F. Supp. 243,

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[3] The intention of the drafters appears perfectly plain: gaps left in the regulation of international air carriage would be filled in by subsequent agreements. This point was made in a request by the French delegation to the conference:

> Considering that the Warsaw Convention provides only for certain difficulties relating to air carriage and that international air navigation raises many other questions that it would be desirable to provide for by international agreements,
>
> Expresses the wish:
>
> That, through the offices of the French Government, which has taken the initiative of the convening of these conferences, that there be convened subsequently, new conferences which will pursue the work of unification.

Minutes, supra, at 182.

247-48 (E.D. Mo. 1994) (same); *Rolnick*, 551 F. Supp. at 264 (same). Were we to read Article 17 to provide the exclusive remedy for personal injury, a carrier would not be liable for injuries caused by the malfunctioning of an escalator, notwithstanding the fact that it may have recklessly disregarded its duty to keep it in proper repair. Beyond the inequity of forcing the passenger to bear the cost of an airline's negligence, safeguarding an airline from this sort of liability removes the incentive for it to maintain its premises properly—an important goal of domestic tort law. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 4, at 25 (5th ed. 1984) ("When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm."); *cf. Day*, 528 F.2d at 34 (airlines are in better position to assess risks and prevent accidents).

The second argument advanced in support of holding the Convention wholly exclusive is that permitting state law claims under any circumstances contravenes the Convention's goal of uniformity. *See Potter*, 98 F.3d at 885. This argument is flawed in two respects. First, while uniformity is certainly one of the two primary goals of the Convention, such a goal has not always been found feasible in all areas of international travel. Second, even where possible, uniformity cannot justify altering the operating structure of the Convention. *See Zicherman*, 116 S. Ct. at 636 (rejecting application of general maritime law to all Convention cases regardless of whether maritime law would naturally apply). We have read *Zicherman* to instruct specifically that the Convention expresses no compelling interest in uniformity that would warrant us in supplanting an otherwise applicable body of law, here state law. *See Pescatore v.*

Pan American World Airways, Inc., 97 F.3d 1, 11 (2d Cir. 1996). Even to accept the argument that uniformity should prevail where the Convention does not apply does not support the ultimate proposition that the Convention must therefore provide the exclusive remedy, because uniformity could be achieved equally as well by allowing recovery outside the Convention, under a uniform body of law. Of course, once the Convention is ruled inapplicable the carrier may, in a liability suit against it under domestic law, interpose all the defenses available to it under that law.

D. *Passengers' Interests*

Finally, excluding state law claims where the Convention does not apply is inconsistent with the Convention's goal of protecting passengers. Underlying the desire for uniformity and limited liability for the carrier was a desire to balance the interests of the passenger and the carrier. *See Lockerbie I*, 928 F.2d at 1271. In return for certainty and limited liability, the carriers accepted presumed fault when the Convention applied, so that passengers or their survivors could obtain recovery in situations where it might be difficult to prove a carrier's negligence. *See id.*

Over the past several decades, international air transportation has transformed from a fragile, fledgling industry into one that is well established and financially secure. In recognition of the increasing strength of the airline industry, the balance has properly shifted away from protecting the carrier and toward protecting the passenger, *see Day*, 528 F.2d at 37, evidenced by the recent intercarrier agreement abandoning the Convention's liability cap and imposing strict liability up to $145,000.

Reading the Convention to preclude recovery for injuries sustained outside the scope of the Convention would undermine the notion of balancing the interests of the carrier and the passenger. Under such a scheme, the carrier would be disproportionately favored by being absolved from liability for its tortious conduct, except under certain limited circumstances. The passenger would be forced to bear the cost of injury, despite the airline being in a better position to distribute the costs of such injuries and to prevent them from occurring. *See* Keeton, *Law of Torts*, *supra*, § 4, at 24 (Tort law tends to place the burden on the corporation, "who by means of rates, prices, taxes or insurance are best able to distribute" risks and losses.). It is highly doubtful that such a skewing of interests was in the contemplation of the original drafters of the Convention, and such an interpretation is clearly at odds with the current goals of the Convention. Consequently, we hold that where the Convention is inapplicable, a plaintiff may seek recourse under state law.

CONCLUSION

We have reviewed El Al's cross-appeal concerning the district court's findings and conclusions embodied in its judgment regarding Tseng's baggage claim and find it to be without merit. Accordingly, the judgment is reversed with respect to Tseng's personal injury claim and affirmed with respect to her baggage claim. Plaintiff's personal injury cause of action is remanded to the district court, which, should it determine it proper to exercise pendent jurisdiction, may then resolve Tseng's outstanding state law claims in accordance with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

94 Civ. 3385 (LLS)

TSUI YUAN TSENG,

Plaintiff,

—against—

EL AL ISRAEL AIRLINES, LTD.,

Defendant.

MEMORANDUM AND ORDER

Plaintiff Tsui Yuan Tseng claims defendant El Al Israel Airlines, Ltd. ("El Al"), which searched her person and bags as she was boarding a flight, subjected her to assault, false imprisonment, physical and mental abuse and humiliation, and the loss of and damage to her property.

The case was tried to the court on March 7, 8, and 11, 1996. From my observation of the witnesses and exhibits, I find the preponderance of the credible evidence establishes the following facts. All Agreed Findings in the Consent Pretrial Order are found as facts, and are supplemented by the findings below.

FACTS

On May 22, 1993, Ms. Tseng went to El Al's terminal at John F. Kennedy International Airport in Queens, New York to take a flight to Tel Aviv. While awaiting check-in she was queried about her reasons for the trip, asked to wait, and then

taken to a small room with a few chairs and a table, where she was searched.

At the instruction of a uniformed man and woman, she put her luggage (a suitcase, a carry-on bag and her purse) on the table and unlocked it. The man and woman took out the contents of her luggage and put her things into small baskets, which they took into another room into which she was not allowed to follow.

The woman then told Ms. Tseng to take off her jacket, sweater, shoes, and belt, and to loosen and lower her blue jeans to just below her hip. The woman proceeded to search her, first by feeling her body by hand outside her clothes from head to toe, and then with an electronic security wand.

After an hour or so, they stuffed her things messily back into her luggage. She was then escorted to her plane. They told her to leave her suitcase there, and that it would be put on the plane.

During the flight, she felt sick, upset, and nervous, and had a headache. She glanced a few times in her carry-on bag, but its contents were so disorganized that she could not find anything.

At her hotel in Tel Aviv, she opened her suitcase, carry-on bag, and purse. She sorted through the messy contents and discovered that many of her clothes were stained and damaged, and that several items were missing, including a Rolex watch, a jade ring, some of her clothes, and a thousand dollars in cash. She called El Al's office in Tel Aviv, and was told that they could not do anything about the losses in Israel and to wait until she was back in the United States and then report them.

She returned to the United States on or about June 20, 1994. Around the end of June, she went to see her doctor for treatment of headaches, upset stomach, ringing in her ears, nervousness and sleeplessness, all of which had bothered her since she was searched. She also brought to El Al, in person, a letter dated July 1, 1994, complaining about her search and detention and listing the items that were missing and damaged.

El Al claims she was searched because her reasons for her trip appeared "illogical," but it is unable (for lack of memory and records) to specify how. It urges, and I accept, that the actual method of search of her person conformed to their usual practice.

DISCUSSION

A. BODILY INJURY

The parties dispute whether the Warsaw Convention applies to plaintiff's claims that she suffered injury as a result of her detention and search by El Al. In particular, they dispute whether her claimed injuries resulted from an "accident" within the meaning of Article 17 of the Convention, which states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Air France v. Saks, 470 U.S. 392, 105 S. Ct. 1338 (1985), dealt with the definition of "accident" in Article 17. The Supreme Court concluded that "liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger," and stated further that "This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." 470 U.S. at 405, 105 S. Ct. at 1345. In *Shen v. Japan Airlines*, 1994 WL 167989 (S.D.N.Y.), *aff'd*, 43 F.3d 1459 (2d Cir. 1994), this court applied the Warsaw Convention to the detention, search, and confinement of passengers by Japan Airlines. *Id.* at *2.

Plaintiff argues that El Al's actions were not an "accident" but wilful misconduct, and therefore not covered by the Convention.

The record in this case does not support the proposition that the search of the plaintiff was wilful misconduct. The actual techniques for carrying out the search were those prescribed by El Al's procedures, and are reasonable in light of the need for discovering small dangerous objects, if the prospective passenger appears to pose a threat.

There is no evidence that the plaintiff actually posed such a threat, and there is no evidence explaining why she was selected to be searched. Although El Al's records state that her story was illogical, no reason is given why El Al personnel thought so.

It may have been a mistake. There may have appeared a basis for El Al's suspicions, although they ultimately proved groundless. However, there is no evidence and no basis for inferring that it was anything more than a mistake. Even if such a mistake can be characterized as misconduct, there is no basis for inferring that it was wilful. Accordingly, I find that it was not such wilful misconduct as might take the case outside the Convention's limitations of liability under Article 25.[1]

Occasional personal searches are recognized incidents of international air travel. The evidence shows that they occur two to four times a day at El Al alone, which averages over 1,000 times per year for that single airline.

Using the flexible application prescribed by the Supreme Court, such a routine search, applied erroneously to plaintiff in the course of embarking on the aircraft, is fairly accurately

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[1] The Convention, in Article 25(1), provides:

The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

characterized as an accident; that is to say, an unexpected or unusual event or happening external to the passenger.

Accordingly, the Warsaw Convention applies.

Under the Convention, the case is governed by *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 111 S. Ct. 1489 (1991), in which the Supreme Court squarely considered and squarely disallowed any recovery for psychic or psychosomatic injury unaccompanied by bodily injury. 499 U.S. at 552, 111 S. Ct. at 1502.

Here, the plaintiff sustained no bodily injury. Her body was not injured by the woman who searched her by feeling the surface of her body outside her clothing with her hands, and by using an electronic security wand to detect metal objects. On the contrary, all of her personal injuries are attributable to her shock and outrage at the way she was treated. Although her injuries may have had physical manifestations, those are the types of psychic or psychosomatic injuries barred by *Floyd* and not the "bodily injury" for which compensation is available under Article 17 of the Convention.

The Convention precludes recovery on such claims under state law. Article 24 of the Convention provides:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply . . . .

See In re Air Disaster at Lockerbie, Scotland, 928 F.2d 1267 (2d Cir.) ("the Warsaw Convention preempts state law causes of action arising under it"), *cert. denied*, 502 U.S. 920, 112 S. Ct. 331 (1991).

Accordingly, Ms. Tseng's claims for personal injuries are dismissed.

B. BAGGAGE

The Convention also applies to plaintiff's claims for damages to her checked and carry-on luggage.

"With respect to checked baggage, Article 18 provides for the strict liability of carriers for loss or damage sustained while under the control of the carrier." *Republic National Bank of New York v. Eastern Airlines, Inc.*, 815 F.2d 232, 236 (2d Cir. 1987). Ms. Tseng's suitcase was under El Al's control when the items in her suitcase were lost and damaged, so El Al is liable for that damage and loss.

For claims of damage to carry-on baggage, the Convention imposes liability on the carrier if the damage is the result of an accident. *See Baker v. Lansdell Protective Agency, Inc.*, 590 F. Supp. 165, 167 (S.D.N.Y. 1984). The items in Ms. Tseng's carry-on baggage were lost and damaged as the result of the search, which was an accident, so El Al is liable for the damage to and loss of items in that carry-on baggage.

1. Notice

The parties dispute whether El Al escapes liability for the loss of and damage to items in plaintiff's baggage under the Convention's requirement that plaintiff give prompt notice to it of the loss.

Article 26 of the Convention provides, in pertinent part:

> (2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. . . .
>
> (3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

Although Article 26 of the Convention on its face requires written notice to the carrier only when there is "damage" to

baggage, notice is also required when items in baggage are lost, because "delivery of a package or container with part of its contents missing is damage and requires notice." *Denby v. Seaboard World Airlines, Inc.*, 575 F. Supp. 1134, 1141 (E.D.N.Y. 1983), *rev'd on other grounds*, 737 F.2d 172 (2d Cir. 1984).

At the time of plaintiff's flight, El Al had extended the time for passengers to give written notice to the carrier from three days, as provided above in Article 26 of the Convention, to seven days, as provided by Rule 55(E)(1) of El Al's tariff, which provides in pertinent part:

> No action shall lie in the case of damage to baggage unless the person entitled to delivery complains to an office of carrier forthwith after the discovery of the damage, and at the latest, within seven (7) days from the date of receipt . . . .

That tariff was approved by the Civil Aeronautics Board, *see* International Passenger Rules and Fares Tariff, NTA (A) No. 324, ¶C.A.B. No. 530, Rule 55(E), and governs here. *See Tishman & Lipp, Inc. v. Delta Air Lines*, 413 F.2d 1401, 1403 (2d Cir. 1969) ("Tariffs filed with the Civil Aeronautics Board if valid, are conclusive and exclusive, and the rights and liabilities between airlines and their passengers are governed thereby").

Ms. Tseng submitted to El Al written notice of her damage in a letter dated July 1, 1993, which was 39 days after her flight to Tel Aviv. There is no evidence that she submitted written notice of the damage to El Al during the seven days after her flight.

Article 26(4) of the Convention provides

> Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Accordingly, Ms. Tseng's claims for damage to her baggage are barred by the notice requirement of Article 26, unless there is "fraud" on the part of El Al.

In *Denby v. Seaboard World Airlines, Inc.*, 737 F.2d 172 (2d Cir. 1984), the Second Circuit stated that the fraud exception " 'is not of a restrictive nature,' " but includes "any intentional acts by the carrier or its agents which significantly decrease the likelihood of the shipper's giving notice during the brief period allowed." 737 F.2d at 183 (quoting N. Matte, Treatise on Air-Aeronautical Law 425 (1981)).

Ms. Tseng, after discovering at her hotel that items in her baggage were damaged and missing, promptly made a telephone call to El Al. An agent of El Al told her that they could not do anything about it and that she should talk to them back in the United States. That statement by El Al "significantly decreased the likelihood" that she would give written notice of her damage to El Al during the brief period allowed. Accordingly, the fraud exception to the notice requirement applies in this case, and the notice requirement does not bar her claim for damage to her baggage.

2. Liability Limitations

Article 22(1) of the Convention limits the liability of a carrier for checked baggage "to a sum of 250 francs per kilogram", unless the passenger has made "a special declaration of value" of the baggage at the time it was delivered to the air carrier and "has paid a supplementary sum if the case so requires." By Order of the Civil Aeronautics Board this limit of liability has been converted to $20.00 per kilogram, or $9.07 per pound. *See* C.A.B. Order 74-1-16, 39 Fed. Reg. 1526 (1974).

There has been no evidence showing how much Ms. Tseng's suitcase weighed. Where the weight of a passenger's baggage is not noted on the baggage check, the weight may be based on the maximum allowable weight as set forth in the airline's tariff. *Republic National Bank v. Eastern Airlines*, 639

F. Supp. 1410, 1411 (S.D.N.Y. 1986), *aff'd*, 815 F.2d 232 (2d Cir. 1987).

At the time of Ms. Tseng's flight, Rule 115(Q) of El Al's tariff provided:

> (1) No article will be accepted for transportation if it exceeds the following maximum quantity/size/weight:
>
> (a) If the maximum outside linear dimensions exceed 80 inches or if the article weighs more than 70 pounds (32 kilograms).

That tariff was approved by the Civil Aeronautics Board. *See* International Passenger Rules and Fares Tariff, NTA (A) No. 324, ¶ C.A.B. No. 530, Rule 115(Q). Because the maximum weight of any article of baggage that Ms. Tseng could have checked with El Al is 70 pounds, El Al's liability for her checked suitcase is limited to $9.07 per pound times 70 pounds, which is $634.90.

The Convention, in Article 22(3), also limits El Al's liability for "objects of which the passenger takes charge himself"—that is, unchecked or carry-on luggage—to "a sum of 5,000 francs per passenger." Because the Civil Aeronautics Board has converted 250 francs to 20 dollars, *see* C.A.B. Order 74-1-16, 39 Fed. Reg. 1526 (1974), 5,000 francs is converted to 400 dollars.

Therefore, the Convention limits[2] El Al's liability for the damage sustained to the plaintiff's baggage to $634.90 for her checked baggage and $400.00 for her unchecked baggage. The evidence shows that the monetary value of the damage to and loss of items in her checked and unchecked baggage,

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[2] The evidence does not establish that the loss of and damage to the items in plaintiff's luggage constituted such willful misconduct as might take the case outside the Convention's limitations of liability under Article 25. *See Chukwuma v. Groupe Air France, Inc.*, 767 F. Supp. 43, 48 (S.D.N.Y. 1991) (to presume willful misconduct "solely on the basis of the fact that some of his luggage was lost or stolen" is "a presumption that would severely undercut Article 22's limitation of liability"), *aff'd*, 962 F.2d 2 (2d Cir. 1992).

respectively, exceeded those amounts. Accordingly, plaintiff is entitled to recover for the damage to her baggage in the amount of $1034.90.

CONCLUSION

Because the Warsaw Convention precludes recovery for emotional injury or for the physical manifestations of such injury, plaintiff's claims seeking such recovery are dismissed.

For her claims of damage to and loss of items in her baggage, plaintiff is entitled to damages in the amount of $1034.90, plus prejudgment interest according to law.

The Clerk is directed to enter judgment accordingly. So ordered.

Dated: New York, New York
March 13, 1996

LOUIS L. STANTON

LOUIS L. STANTON
U.S.D.J.

HOUSE OF LORDS

ON 12 DECEMBER 1996

ABNETT (KNOWN AS SYKES)

(APPELLANT)

—v.—

BRITISH AIRWAYS PLC

(RESPONDENTS) (SCOTLAND)

SIDHU AND OTHERS (A.P.)

(APPELLANTS)

—v.—

BRITISH AIRWAYS PLC

(RESPONDENTS)

Lord Browne-Wilkinson, Lord Jauncey of Tullichettle, Lord Mustill, Lord Steyn, Lord Hope of Craighead

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OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

LORD BROWNE-WILKINSON

My Lords,

For the reasons given in the speech to be delivered by my noble and learned friend, Lord Hope of Craighead, which I

have read in draft and with which I agree, I would dismiss both these appeals.

LORD JAUNCEY OF TULLICHEITLE

My Lords,

For the reasons given in the speech to be delivered by my noble and learned friend, Lord Hope of Craighead, which I have read in draft and with which I agree, I too would dismiss both these appeals.

LORD MUSTILL

My Lords,

For the reasons given in the speech to be delivered by my noble and learned friend, Lord Hope of Craighead, which I have read in draft and with which I agree, I too would dismiss both these appeals.

LORD STEYN

My Lords,

For the reasons given in the speech to be delivered by my noble and learned friend, Lord Hope of Craighead, which I have read in draft and with which I agree, I would dismiss both these appeals.

LORD HOPE OF CRAIGHEAD

My Lords,

The question in these two appeals is whether the Warsaw Convention as amended at The Hague, 1955, as set out in the Schedule 1 to the Carriage by Air Act 1961, provides the exclusive cause of action and sole remedy for a passenger who claims against the carrier for loss, injury and damage sustained in the course of, or arising out of, international carriage by air.

In both cases claims were made against the respondents, British Airways Plc., by passengers who had been travelling on a scheduled international flight from the United Kingdom to Malaysia via Kuwait. The flight left London Heathrow for

Kuala Lumpur on 1 August 1990. It landed in Kuwait for refuelling on 2 August 1990, about five hours after Iraqi forces had begun to invade Kuwait at the commencement of what became known as the Gulf War. The passengers and crew were all taken prisoner by the Iraqis. They were detained initially at Kuwait Airport, then at Kuwait City and thereafter in Baghdad. The appellants, who were subsequently released and returned to the United Kingdom, claimed damages against the respondents for the consequences of their captivity. Their claims for personal injury were made at common law, as it was accepted that they had no remedy in this regard under article 17 of the Convention.

Mrs. Judith Helen Abnett, to whom I shall refer as "the pursuer," raised her action in the Court of Session in Scotland. She was resident in England where the respondent's principal place of business is situated and she had purchased her ticket there. But the respondents also have a place of business in Edinburgh, which the pursuer contended was sufficient to confer jurisdiction on the Scottish courts at common law. She based her claim on article 19 of the Convention under which the carrier is liable for damage occasioned by delay and, alternatively, at common law for breach of an implied condition of the contract that the respondents would take reasonable care for her safety. When the case came before the Lord Ordinary, Lord Marnoch, for debate on the procedure roll he was invited to dismiss the action on various grounds. One of these was that the Scottish courts had no jurisdiction, having regard to article 28 of the Convention. After a careful review of the wording of that article and of various authorities which were cited to him from the United States of America, France and Nigeria, he held that the Scottish courts did have jurisdiction and no appeal has been taken against his decision on this point. He also held that the pursuer's case for damage occasioned by delay under article 19 of the Convention was irrelevant, and that the Convention excluded recourse to any common law remedy by a passenger who suffered injury in the course of or arising out of an international flight. On 20 December 1993 he repelled the respondents'

plea in law to the jurisdiction of the Court of Session, but he sustained their second and third pleas in law and dismissed the action as irrelevant, 1996 S.L.T. 529. The pursuer reclaimed on the single question as to whether her claim at common law had been excluded by the Convention. On 28 April 1995 an Extra Division (Lord Allanbridge, Lord Mayfield and Lord Clyde), who had the advantage of the judgment of the Court of Appeal in the English action which supported the view which had been taken by Lord Marnoch, refused her reclaiming motion: 1996 S.L.T. 529, 538-547. The pursuer has now appealed against this decision to your Lordships' House.

Miss Kiran Sidhu, Miss Harjinder Sidhu and Mr. Ravinder Sidhu, to whom I shall refer as "the plaintiffs," raised their action in the Brentford County Court. In their particulars of claim they alleged that the loss and damage which they had suffered was caused by the respondent's negligence. Their proceedings were issued on 30 July 1993, which was outside the two year time limit allowed by article 29 of the Convention but inside the three year time limit which was otherwise applicable. No claim was made by them under any of the provisions of the Convention. The respondents applied for an order that their action be dismissed as it was time barred by article 29. When their application came before Judge Marcus Edwards they also submitted that the Convention provided the exclusive remedy in respect of claims for damages arising out of international carriage by air of persons and baggage for reward. On 28 February 1994 the judge, who was referred to Lord Marnoch's decision in the pursuer's case, held for the same reasons as those given by Lord Marnoch that the plaintiffs had no rights save under the Convention. He also held that their right to damages, if any, was extinguished by article 29 of the Convention two years after 2 August 1990, and he dismissed their claims. On 27 January 1995 the Court of Appeal (Leggatt, Swinton Thomas and Otton L.JJ.) (unreported), Court of Appeal (Civil Division) Transcript No. of 1995, dismissed the plaintiffs' appeal against the order which had been made by Judge Marcus Edwards. The plaintiffs'

appeal to this House against the order made by the Court of Appeal was heard together with the pursuer's appeal against the interlocutor of the Extra Division of the Court of Session.

THE FACTS

The pursuer and the plaintiffs were all fare paying passengers on the same flight, BA.149, which left London Heathrow for Kuala Lumpur at about 6.15 p.m. on 1 August 1990. The flight was scheduled to travel to Kuala Lumpur by way of Kuwait and Madras. It was due to arrive at Kuwait in the early hours of the following day, 2 August 1990. According to the pusuer's pleadings in the Scottish action, relations between Iraq and Kuwait had been deteriorating for some days prior to the departure of the flight from Heathrow. She avers that the respondents knew or ought to have known that the passengers would be at severe risk if the aircraft were to land in Kuwait after hostilities had been commenced against Kuwait by Iraq. The same point is made by the plaintiffs in their particulars of claim, where they refer to the respondents' negligence in landing their aeroplane in Kuwait when they knew or ought to have known of the hostile situation between Iraq and Kuwait and the possibility that war might break out and Kuwait be invaded by Iraq. In the event the invasion of Kuwait by Iraq began at about 11.15 p.m. on 1 August 1990. About four hours later, at about 3.00 a.m. on 2 August 1990, the respondents' aircraft landed at Kuwait airport for refuelling. The passengers disembarked into the transit lounge at the airport terminal. While they were in the terminal the airport was attacked by Iraqi aircraft and taken over by Iraqi soldiers. The airport was closed, and the passengers and crew of flight BA.149 were detained by the Iraqis and later removed to Baghdad.

The pusuer avers that she was detained by Iraqi forces for a period of about a month. She claims to have suffered psychological injury due to the stress resulting from her captivity and the pain of separation from her family. She also claims that she was off work on a number of occasions as a result of the psychological consequences. She claims damages of

£100,000 on the ground that the respondents were in breach of an implied condition of her contract with them that they would take reasonable care for the safety of their passengers, in respect that they allowed their aircraft to land at Kuwait when they knew or ought to have known that the passengers were exposed to risk due to the invasion. Her alternative claim for damages caused by delay under article 19 of the Convention was, as I have said, held by Lord Marnoch to be irrelevant and no further issue arises on that point. She made no claim against the respondents under article 17 of the Convention.

The plaintiffs state that they were detained by the Iraqi forces until about 21 August 1990. In their particulars of injuries they allege that they suffered physical and psychological injuries. These included mental injury comprising stress and anxiety and possible permanent psychological damage as a result, and bodily injury comprising loss of weight, eczema and excessive menstrual bleeding. They also claim for loss of baggage amounting to £2,562.93 as special damages. Their action has been based entirely on negligence at common law. The negligence relied on in their particulars falls under three heads: landing their aircraft in Kuwait when the respondents knew or ought to have known of the hostile situation between Kuwait and Iraq and the possibility that war might break out and Kuwait be invaded; flying their aircraft into a war zone or war situation; and failing to divert their aircraft to a safer airport for refuelling when they knew or ought to have known that Kuwait airport was at risk of being attacked or invaded. They make no claim against the respondents under article 17 of the Convention.

THE ISSUE

Although there are some differences of detail between the two actions—the pursuer claims only for psychological injury, while the plaintiffs claim also for bodily injury and loss of baggage, and the pursuer's claim is for breach of contract while the plaintiffs' claim is in negligence—the issue of law which arises in both of these appeals is the same. It is whether

the Warsaw Convention as amended at The Hague, 1955 provides the exclusive cause of action and remedy in respect of claims for loss, injury and damage sustained in the course of, or arising out of, international carriage by air. If the answer to that question is in the affirmative, it is accepted that the claims which have been brought in each case for damages at common law for personal injury must be dismissed. It is not disputed that the plaintiffs' claim for loss of baggage must be dismissed also, on the additional ground that it was brought outwith the period of two years referred to in article 29 of the Convention after which the right to damages under the Convention is extinguished. It is common ground, for reasons to which I shall return later, that neither the pursuer nor the plaintiffs have any claim against the respondents under article 17 of the Convention in respect of their personal injuries.

THE PROVISIONS OF THE CONVENTION

I shall have something to say later about the background to the Convention. At this stage it is necessary to identify the statutory provisions which are relevant to this case. These are to be found in the Carriage by Air Act 1961, by which effect was given to the Convention concerning international carriage by air known as "The Warsaw Convention as Amended at The Hague, 1955," so that it might have the force of law in the United Kingdom in relation to any carriage by air to which the Convention applied, and the rules contained in the Convention were enabled to be applied, with or without modification, in other cases and in particular to non-international carriage by air not governed by the Convention. Force of law to the Convention in regard to international carriage by air is given by section 1(1) of the Act read together with Schedule 1, in which the provisions of the Convention are set out. Part I of the Schedule sets out the English text of the Convention, and Part II sets out the French text. Section 1(2) provides that, if there is an inconsistency between the text in English and Part I of Schedule 1 and the text in French in Part II of that Schedule, the text in French shall prevail.

The headnote to the English text in Part I of Schedule 1 describes the Convention as being "for the Unification of Certain Rules relating to International Carriage by Air." There then follow five chapters, headed respectively Chapter I—"Scope—Definitions;" Chapter II—"Documents of Carriage;" Chapter III—"Liability of the Carrier;" Chapter IV—"Provisions Relating to Combined Carriage;" and Chapter V—"General and Final Provisions."

In Chapter I, article 1(1) is in these terms:

> "(1) This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking."

Article 1(2) of this chapter contains a definition of the expression "international carriage" which need not be quoted, as it is common ground that the present case is concerned with international carriage by air because the place of departure and the place of destination were both situated within the territories of High Contracting Parties.

Among the documents of carriage for which rules are provided by Chapter II is the passenger ticket. Article 3(1) of section 1 of this chapter is in these terms:

> "(1) In respect of the carriage of passengers a ticket shall be delivered containing:
>
> (a) an indication of the places of departure and destination;
>
> (b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;
>
> (c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for

death or personal injury and in respect of loss of or damage to baggage."

The only other chapter which contains provisions relevant to this case is Chapter III, which is headed "Liability of the Carrier." The articles comprised in this chapter are those numbered from 17 to 30, of which the following is a brief summary. Article 17 is concerned with the carrier's liability for death or injury suffered by a passenger. Article 18 is concerned with the carrier's liability for destruction or loss of or damage to registered baggage or cargo. Article 19 provides that the carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. These provisions must be read together with article 24, which provides that, in the cases covered by these articles, any action for damages, however founded, can only be brought subject to the conditions and limits set out in the Convention. Article 20 provides: "The carrier is not liable if he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Article 21 deals with cases where the damage was caused or contributed to by the injured person's negligence. Article 22 makes provision for the limitation of the liability of the carrier for each passenger and for registered baggage and cargo, and article 23 provides: "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down by the Convention shall be null and void. . . ." Article 25 provides that these limits of liability shall not apply if the damage results from an act or omission of the carrier, his servants or agents done with intent to cause damage or recklessly. Article 25, 25A, 26 and 27 contain various ancillary provisions. Article 28, which deals with jurisdiction, restricts the places where an action for damages may be brought, and provides that "questions of procedure shall be governed by the law of the court seised of the case." Article 29 provides that the right to damages shall be extinguished if the action is not brought within two years.

Lastly, article 30 deals with the case where the carriage is to be performed by various successive carriers.

As I shall require to examine the wording of articles 17, 18, 23 and 24 more closely at a later stage, it is convenient now to set out the full terms of these articles. They are as follows:

Article 17:

"The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Article 18:

"(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air."

Article 23:

"(1) Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity

of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

(2) Paragraph (1) of this article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried."

Article 24:

"(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

THE COMPETING ARGUMENTS

The issue between the parties is confined to a single but important point which depends for its answer on the interpretation of the Convention. Much of the background is common ground. As both cases are being dealt with on a preliminary issue of law, the facts have not been investigated. The respondents made it clear that they were not to be taken as admitting that all the allegations which have been made against them are true. But they were content that the issue of law should be dealt with on the pursuer's pleadings in the Scottish action and on the particulars of claim in the English action. For their part the pursuer and the plaintiffs accept that their claims against the respondents arise out of international carriage by air. Their apprehension by the Iraqis took place in the terminal at Kuwait, but they accept that they were still in the course of international carriage by air at that point because they were still in transit to their ultimate destination in Malaysia. The breaches of duty which they allege all relate to decisions taken while the aircraft was in the air between London and Kuwait. It is, however, also common ground

between the parties that neither the pursuer nor the plaintiffs have a claim against the respondents under article 17 of the Convention.

I do not think that it is necessary to explore the reasons why the view has been taken that article 17 does not provide a remedy in this case. It is sufficient to say that two particular reasons were given for this view in the course of the hearing before the Inner House in the Court of Session. First, it was said that no "accident" causing the damage took place on board the aircraft. Secondly, it was said that the injury sustained by the pursuer—the stress resulting from her captivity and the pain of separation from her family, absence from work and loss of income due to the psychological consequences of the captivity—did not fall within the scope of "bodily injury" for the purposes of article 17. In the English action the plaintiffs conceded in the Court of Appeal that no accident causing damage took place on board the aircraft or in the course of disembarkation. In their case bodily injury is alleged, but it was submitted on their behalf that liability for damage to the person under article 17 only arises in the event of any bodily injury suffered by a passenger and that psychological damage, which was the principal basis for their claim, probably did not come within that category. It was suggested to your Lordships in the course of the argument that the phrase "bodily injury" in article 17 ought now to be construed as including psychological damage, especially if it were shown to have a physiological basis by medical evidence. But that point does not arise for decision in this case and it was not fully argued. I prefer to express no opinion upon it.

It should be recorded also that all parties were agreed that, if a passenger had a claim under article 17 against the carrier, there was no concurrent common law remedy. It is common ground therefore that a passenger who has a claim for bodily injury caused by an accident which took place on board the aircraft, or in the course of any of the operations of embarking or disembarking, cannot maintain a separate claim at common law for any loss, injury or damage not covered by article

17 of the Convention. That seems to follow inevitably from the provisions of article 24(2), which declares that in the cases covered by article 17 any action of damages, however founded, can only be brought subject to the conditions and limits set by the Convention.

So the stark issue which is before us in this appeal is whether a passenger who has sustained damage in the course of international carriage by air due to the fault of the carrier, but who has no claim against the carrier under article 17 of the Convention, is left without a remedy.

THE APPROACH TO CONSTRUCTION

I now turn to the material which we were invited to consider in reaching our decision as to how we should decide this issue. Some of this material is plainly relevant, some of it plainly is not and some of it will require consideration and analysis in order to decide whether it is of any assistance to us in this case. The following catalogue provides the starting point.

(i) THE CARRIAGE BY AIR ACT 1961

Mr. Webb took us through various provisions in the statute which he said could be relied on as indicating that the intention was that the Convention should provide the exclusive remedy. Similar arguments were considered in the courts below. For my part I do not think that the wording of the statute can assist us one way or the other. What we are concerned with in this case is the meaning to be given to the Convention. This must depend upon the wording and structure of the Convention itself. All that need to be taken from the Act for present purposes is that, in terms of section 1(1), the Convention as set out in Schedule 1 to the Act has the force of law in the United Kingdom in relation to any carriage by air to which the Convention applies; and that, in terms of section 1(2), if there is any inconsistency between the text in English in Part I of Schedule 1 and the text in French in Part II of that Schedule, the text in French shall prevail.

(ii) THE ENGLISH TEXT OF THE CONVENTION

This plainly is the primary source to which we must turn for a solution to the point raised in this case. It may be convenient, however, to record at this point that all parties were agreed, as they were in the courts below, that the Convention should receive a purposive construction. This point was fully explored in Fothergill v. Monarch Airlines Ltd. [1981] A.C. 251, where the question at issue arose under article 26(2) of the Convention. It does not need to be elaborated upon in this case. It is now well established that a purposive approach should be taken to the interpretation of international conventions which have the force of law in this country. As Lord Diplock said, at p. 279, one must give a purposive construction to the Convention looked at as a whole. The observations of Greene L.J. in Grein v. Imperial Airways Ltd. [1937] 1 K.B. 50, 74-76, to which I shall return later, are to the same effect.

(iii) THE TRAVAUX PRÉPARATOIRES

Here again the parties were in agreement. Reference was made in the courts below to the negotiating history of the Convention, and in particular to the minutes of the International Conference on Private Aeronautical Law at Warsaw from 4 to 12 October 1929. We also were referred to various passages from these minutes in the course of the argument. The question whether it is legitimate to resort to material of this kind was discussed in Fothergill v. Monarch Airlines Ltd., and it is unnecessary to go over this ground again. It is sufficient to say that cautious use may be made of this material, the availability to the public of which is not in doubt. But it will only be helpful if, after proper analysis, it clearly points to a definite intention on the part of the delegates as to how the point at issue should be resolved.

(iv) DECISIONS BY THE COURTS IN THE UNITED KINGDOM

The only cases to which we were referred as having any possible bearing on the issue which we have to decide in this case were Grein v. Imperial Airways Ltd. [1937] 1 K.B. 50, 74-76 and Gatewhite v. Iberia Lineas Aereas de España S.A. [1990] 1 Q.B. 326. The issue which was raised in Grein v. Imperial Airways Ltd. was a different one from that which arises here. It was whether a passenger who met his death while travelling by aeroplane on a return ticket between London and Antwerp—Belgium not being a High Contracting Party—was engaged on "international carriage" within the meaning of the Convention. But Greene L.J., at pp. 74-76, made some observations about the approach to be taken to the construction of the Convention which are helpful in the present case. The Gatewhite case arose out of a contract for the carriage of goods by air. The question was whether the owner of goods not named as the consignor or consignee on the air waybill was entitled to sue the carrier for damages to the goods while in transit. I shall return to this case later in order to see what help it can give to us in the present case.

(v) DECISIONS BY FOREIGN COURTS

Much of the discussion in the Court of Session, both in the Outer House before the Lord Ordinary, Lord Marnoch, and in the Extra Division, was taken up with an examination of decisions of various courts in the United States. We were referred to the cases mentioned in the courts below and to several other cases from the same source. We were also referred to a recent decision in the Tribunal de Grande Instance de Paris arising out of the same incident as the claims which are being made in the present case. Parties were agreed that we might have regard to this material for such assistance as it might give. Clearly, much must depend upon the status of each court and of the extent to which the point of issue has been subjected to careful analysis. Material of this kind, where it is found to be of the appropriate standing and quality, may be of some help in pointing towards an interpretation of the Con-

vention which has received general acceptance in other countries. But the value of the material will be reduced if the decisions conflict with each other or if no clear line of approach appears from them after they have been analysed.

(vi) EUROPEAN CONVENTION OF HUMAN RIGHTS

Mr. Clive Nicholls for the plaintiffs submitted that it would be inconsistent with the obligations of the United Kingdom under various articles of the European Convention of Human Rights if a construction were to be placed on article 17 of the Warsaw Convention which excluded the claim which they were seeking to make in this case. Your Lordships had no hesitation in rejecting that argument. The provisions of the European Convention have no bearing on the interpretation of international conventions such as the Warsaw Convention on carriage by air—and there are many other examples—which are concerned with commerce between countries and which seek, by a process of compromise, to achieve uniformity across international frontiers in the application of trade law.

It must also be observed that, while some parties to the Warsaw Convention are parties to the European Convention of Human Rights, some—notably the United States of America—are not. We cannot assume that the principles expressed in the European Convention are common to all those countries who are parties to the Warsaw Convention. Thus we would risk introducing an element of distortion into the debate, in conflict with the broad aim of uniformity of interpretation between states, if we were to rely on the European Convention as an aid to the construction of the Warsaw Convention in the present case. In T. v. Secretary of State for the Home Department [1996] 2 W.L.R. 766, 793A, Lord Lloyd of Berwick said that in a case concerning an international convention it was obviously desirable that decisions in different jurisdictions should, so far as possible, be kept in line with each other. As Dicey & Morris, The Conflict of Laws, 12th ed. (1993), p. 9, observe:

> "The purpose of an international convention is to harmonise the laws of all contracting states on the particu-

lar topic dealt with by the Convention. It is therefore very important that the interpretation of the Convention should be the same, so far as possible, in all contracting states."

(vii) ANALYSIS OF THIS MATERIAL

It follows from what I have just said that no analysis is required of the 1961 Act or of the European Convention of Human Rights. I turn therefore immediately to the Convention itself, which is the primary source to which we must look for a solution to the question we have to decide.

(a) THE ENGLISH TEXT OF THE CONVENTION

I can confine myself to the English text, because all parties were agreed that, except in one respect with which I can deal briefly, there was for present purposes no material difference between it and the French text.

The Convention describes itself as a "Convention for the Unification of Certain Rules relating to International Carriage by Air." The phrase "Unification of Certain Rules" tells us two things. The first, the aim of the Convention is to unify the rules to which it applies. If this aim is to be achieved, exceptions to these rules should not be permitted, except where the Convention itself provides for them. Second, the Convention is concerned with certain rules only, not with all the rules relating to international carriage by air. It does not purport to provide a code which is comprehensive of all the issues that may arise. It is a partial harmonisation, directed to the particular issues with which it deals.

These issues are identified in the principal chapter headings, which are those to Chapters II, III and IV—"Documents of Carriage," "Liability of the Carrier" and "Provisions Relating to Combined Carriage." Nothing is said in this Convention about the liability of passengers to the carrier, for example. Nor is anything said about the carrier's obligations of insurance, and in particular about compulsory insurance against third party risks. It is clear from the content and struc-

ture of the Convention that it is a partial harmonisation only of the rules relating to international carriage by air. That is sufficient to give content to the phrase "Certain Rules." I do not find in that phrase an indication that, in regard to the issues with which the Convention does purport to deal, its provisions were intended to be other than comprehensive.

The principal search for indications of an intention one way or the other about exclusivity of provision in regard to the carrier's liability must be conducted within the provisions of Chapter III. But before I come to this chapter there are two provisions in the earlier chapters which are worth noting as being of some value. First, Article 1(1) states that the Convention applies to "all international carriage of persons, baggage or cargo performed by aircraft for reward." The word "all" is important, simply because it is so all-embracing. It indicates that the framers of the Convention were looking to solutions, no doubt by a process of adjustment and compromise, which could be regarded as acceptable for universal application in all cases. The other provision is article 3(1)(c), which requires that the ticket to be delivered to the passenger must contain among other things

> "a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."

This provision was relied on to some extent by Lord Clyde, 1996 S.L.T. 529, 545J. He said that the words used here would seem quite absoluteb [sic]—the qualification that the limits apply "in most cases" presumably covering such exceptions as are contained in article 25, which deals with cases where the carrier, his servants or agents have caused intentional damage or acted recklessly. It is here that the French text may be important. The relevant part of the provision is stated there in these terms:

> "(c) . . . leur transport peut être régi par la Convention de Varsovie qui, en général, limite la responsabilité du transporteur en cas de mort ou de lésion corporelle, ainsi qu'en cas de perte ou d'avarie des bagages."

The word "governs" which is to be found in the English text is an accurate translation of the word "régi" in the French text. But the English version does not follow the French wording precisely—the phrase "peut être régi" is not, as such, reproduced. So on balance I am inclined not to attach significance to this provision, which in any event is dealing only with the wording of a notice on the passenger's ticket and not with the substance of the rules about the carrier's liability.

Turning to Chapter III itself, the chapter heading expresses its subject matter in the words "Liability of the Carrier." In contrast to the title to the Convention itself, which uses the expression "Certain Rules," we find here a phrase which is unqualified. My understanding of the purpose of this chapter therefore, from what we have seen so far, is that it is designed to set out all the rules relating to the liability of the carrier which are to be applicable to all international carriage of persons, baggage or cargo by air to which the Convention applies.

Chapter III begins by setting out the three primary rules. These are the rules relating to the carriage of passengers, to the carriage of registered baggage or cargo and to delay in the carriage by air of passengers, baggage or cargo. While article 19 is unqualified—it states simply that the carrier is liable for damage occasioned by delay in the carriage by air—the other two articles are qualified, because the liability which they create applies only in the events described and only if certain other conditions are satisfied: see articles 20 and 21. This, however, is not in itself a reason for regarding these provisions as non-exclusive remedies. One has to look further into the details of the chapter in order to grasp the whole context in which these carefully defined liabilities have been devised.

Articles 20 and 21 enable the carrier to avoid liability in whole or in part. They contain nothing of significance for pre-

sent purposes. Article 22 however is important, because it limits the liability of the carrier. It does so in terms which enable the limitation of liability to be applied generally to all cases where the carrier is liable in the carriage of persons and of registered baggage and cargo. Article 22(1) begins simply with the words "In the carriage of persons." Article 22(2)(a) begins with the words "In the carriage of registered baggage and of cargo." The intention which emerges from these words is that, unless he agrees otherwise by special contract—for which provision is made elsewhere in the article—the carrier can be assured that his liability to each passenger and for each package will not exceed the sums stated in the article. This has obvious implications for insurance by the carrier and for the cost of his undertaking as a whole. Article 22(4) makes provision for the award, in addition, of the whole or part of the costs of the litigation. But this is subject to the ability of the carrier to limit his liability for costs by an offer in writing to the plaintiff. The effect of these rules would, I think, be severely distorted if they could not be applied generally to all cases in which a claim is made against the carrier.

Articles 23 and 24 also are provisions which seem to have been designed to apply generally, and to indicate that the possibility of exceptions to the rules laid down in Chapter III was not being contemplated. Article 23 states that any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Convention shall be null and void. It then goes on to state that the nullity of any such provision does not involve the nullity of the whole contract, which is to remain subject to the provisions of the Convention. The generality of effect is to be found in the opening words, since the article applies to "any provision" which tends to relieve the carrier of liability or to fix a lower limit than that laid down by the Convention. I think that the purpose of this provision is clear. It is to protect the passenger or other person dealing with the carrier against provisions of the kind which it describes. Contracting out of liability in contracts of carriage is, of course, now widely regulated by statute. But no doubt in the early 1920's, when what

became the Warsaw Convention was being negotiated, carriers engaged in international carriage by air were free to contract on whatever terms they cared to select, controlled only by the demands of the marketplace in which they were operating. To surrender freedom of contract on this issue was an important concession on the part of carriers, which made sense only in the context of the entire set of rules by which their conduct was to be regulated.

The counterpart of what was plainly a compromise is to be found in the following article, article 24. This Article provides that in the cases covered by articles 18 and 19 and by article 17 respectively—these cases are dealt with separately in two different paragraphs—"any action of damages, however founded, can only be brought subject to the conditions and limits set" by the Convention. It should be noted in passing that paragraph (2) of the article states that this rule is to apply to the cases covered by article 17 "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." As Professor Rene H Mankiewicz has pointed out in his article, "The Judicial Diversification of Uniform Private Law Conventions—The Warsaw Convention's Days in Court" (1972) 21 I.C.L.Q. 718, 741 no one could expect states to be prepared to amend their laws relating to these questions, which are basic to the laws of tort and contract and therefore of a wide reaching significance, for the sole purpose of unifying and accommodating all matters relating to the law of the air carrier's liability.

The structure of these two provisions seems to me therefore to be this. On the one hand the carrier surrenders his freedom to exclude or to limit his liability. On the other hand the passenger or other party to the contract is restricted in the claims which he can bring in an action of damages by the conditions and limits set out in the Convention. The idea that an action of damages may be brought by a passenger against the carrier outside the Convention in the cases covered by article 17—which is the issue in the present case—seems to be entirely contrary to the system which these two articles were designed to create.

The reference in the opening words of article 24(2) to "the cases covered by articles 17" does, of course, invite the question whether article 17 was intended to cover only those cases for which the carrier is liable in damages under that article. The answer to that question may indeed be said to lie at the heart of this case. In my opinion the answer to it is to be found not by an exact analysis of the particular words used but by a consideration of the whole purpose of the article. In its context the purpose seems to me to be to prescribe the circumstances—that is to say, the only circumstances—in which a carrier will be liable in damages to the passenger for claims arising out of his international carriage by air.

The phrase "the cases covered by article 17" extends therefore to all claims made by the passenger against the carrier arising out of international carriage by air, other than claims for damage to his registered baggage which must be dealt with under article 18 and claims for delay which must be dealt with under article 19. The words "however founded" which appear in article 24(1) and are applied to passenger's claims by article 24(2) support this approach. The intention seems to be to provide a secure regime, within which the restriction on the carrier's freedom of contract is to operate. Benefits are given to the passenger in return, but only in clearly defined circumstances to which the limits of liability set out by the Convention are to apply. To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier. Thus the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. The carrier does not need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by the Convention.

Only two other articles may be mentioned in this analysis: articles 28 and 29. These restrict the places in which "an action for damages" must be brought, and provide that "the right to damages" shall be extinguished if an action is not brought within two years. Here again it seems that a balance has been struck in the interests of uniformity of treatment and of certainty. I see no sign in the generality with which these provisions have been expressed of a recognition that there may be some actions of damages arising from the international carriage of passengers by air which are not subject to these rules. It would be largely destructive of the system which this chapter seems to have been designed to lay down if a passenger were to be able, for example, to maintain a claim of damages for non-bodily injury, for loss of or damage to the personal possessions which he had with him inside the aircraft or for economic loss, outside the conditions and limits set by the Convention while maintaining a claim under the Convention for the bodily injury. No doubt it was for this reason that it was conceded that, if he had a claim under article 17, the passenger would not be able to maintain any other claim against the carrier arising out of the same incident. But it seems to me that, by parity of reasoning, the same approach must be taken to cases arising out of international carriage by air where he has no claim under article 17 at all.

(b) THE TRAVAUX PRÉPARATOIRES

We were shown a copy, in the English translation, of the Minutes of the Second International Conference on Private Aeronautical Law, 4 to 12 October 1929 at Warsaw. Attached to these minutes are copies of the documents submitted to the conference. These comprise (a) a preliminary draft of the Convention prepared by the International Technical Committee of Legal Aeronautical Experts (C.I.T.E.J.A.), together with a report on the preliminary draft by Mr. Henri De Vos in name of the committee and (b) proposals of amendments submitted to the Warsaw Conference by a preparatory committee and by various delegations to the conference. The first conference had been held in Paris in 1925, so the material

which was before the conference in Warsaw in 1929 was the product of four years work by the committee.

I do not think that it would be profitable for me to attempt to summarise this material. There are various passages in the minutes where the delegates are recorded as expressing views about the object of the Convention. For example, Sir Alfred Dennis on behalf of Great Britain, said at p. 85, that the object of the Convention was to ensure uniformity of law, and, at p. 213, he said that what became article 24(1) touched the very substance of the Convention because it excluded resort to the common law. Similar observations are attributed to the Soviet delegate, Mr. Sabanin, at p. 40 and to the French delegate, Mr. Ripert, at p. 47. At p. 49, Mr. De Vos referred to various questions relating to the carrier's liability as being connected to each other, as they constituted "the parts of a whole which is the system of liability." But these are mere straws in the wind which emerged during several days of detailed discussion to which many delegates contributed. I do not find a sufficiently clear and consistent expression of views here about the objects of the Convention on the point which is at issue in this case to enable me to say that the answer to the problem is to be found in the minutes. The most that can be said is that I have not found anything in these minutes or in the accompanying material which contradicts the impression which I have already formed on reading the Convention.

There is one particular point arising from the minutes however on which I think I should comment. It relates to the phrase "Certain Rules" in the title to the Convention. The title in the preliminary draft did not contain this phrase. In their proposals, however, the delegates from Czechoslovakia had proposed an amendment to Chapter IV of the draft to the effect that there should be inserted in it an article which would have provided that, in the absence of a stipulation in the Convention, the provisions of laws and national rules relating to carriage in each state should be applicable. The effect of that amendment, if introduced, would have been to enable the common law to apply when liability could not be established under the Convention. There was a brief discus-

sion of this amendment during the sixth session of the conference on 9 October: see p. 176 of the minutes. When the proposal was drawn to the attention of the delegates the head of the Italian delegation, Mr. Giannini, said that, following a suggestion made by the German delegation, they were going to propose adopting as a title for the Convention the words "Convention relating to certain rules for the unification of private aeronautical law." He added that, given that this title indicated the special character of the Convention, the Czechoslovak delegation no longer insisted on its amendment. The Czechoslovak proposal was then withdrawn without further discussion. A proposal by the Yugoslav delegation that the Berne Convention should be applied for cases not provided for by the Convention was also withdrawn.

Mr. Nicholls suggested that the meaning to be given to the words "Certain Rules" in the title should reflect the text of the withdrawn Czechoslovakian amendment. In my opinion, however, the circumstances in which the Czechoslovak delegation agreed to withdraw their proposal are not sufficiently explored in the minutes to enable us to take that meaning from these words. Nor indeed is it sufficiently clear what the scope was of the amendment which that delegation had originally proposed. In an earlier discussion, noted at p. 85 of the minutes, both the British and the Soviet delegates had expressed concern at the insertion of a clause which would have opened gaps in the Convention, as its object was to ensure uniformity. It may be that all the Czechoslovak delegates were seeking to do was to insert a clause in order to clarify the position in regard to chapters of law relating to international carriage by air with which the Convention was not attempting to deal. Their agreement to the substitution of the words "Certain Rules" in the title can easily be explained if that was the only purpose which their amendment was intended to serve.

(c) DECISIONS BY THE COURTS IN THE UNITED KINGDOM

As I said earlier, the only United Kingdom cases to which we were referred were Grein v. Imperial Airways Ltd. [1937]

1 K.B. 50, 74-76, in which Greene L.J. made certain observations about the approach to construction of the Convention and Gatewhite v. Iberia Lineas Aereas de España S.A. [1990] 1 Q.B. 326, in which Gatehouse J. held that, in the absence of express provision in the Convention excluding the owner's right of action, the owner of goods damaged or lost by a carrier was entitled to sue in his own name in accordance with the lex fori and accordingly that the plaintiffs were entitled to damages to be assessed at common law.

In Grein v. Imperial Airways Ltd. Greene L.J. made observations, at pp. 74-76, about the general objects of the Convention, the desirability of an international code for air carriage, and the need to approach the Convention with a proper appreciation that it was one of the main objects of the Convention to secure the removal of various difficulties which might otherwise have arisen by means of a uniform international code. These observations are helpful as they support the approach which I have taken in my reading of the Convention. But there is nothing in the facts of the case or the particular decision arrived at which is relevant to the issue in this case.

In Gatewhite v. Iberia Lineas Aereas de España S.A. the defendants had argued that, as that was a case of international carriage of cargo by air, it was governed by the Convention and that the plaintiffs had no claim under it as only the consignor or the consignee had a right of action against the carrier. The judge rejected this argument. He said, at p. 331G that it was remarkable that nowhere did the Convention expressly exclude the right of the owner of goods to sue the carrier for damage to or loss of the goods and that the limitation of this right to consignor or consignee alone arose, if at all, by implication. Having examined various decisions from other jurisdictions which were directed to this issue he was attracted by the reasoning in Tasman Pulp & Paper Co. Ltd. v. Brambles J.B. O'Loghlen Ltd. [1981] 2 N.Z.L.R. 225. It seemed to him that, as the Convention did not expressly deal with the position by excluding the owner's right of action, although it could so easily have done so, the lex fori could fill the gap: see p. 334G.

Lord Marnoch in the Outer House of the Court of Session, 1996 S.L.T. 529, 537B was able to distinguish the Gatewhite case on the ground that it was dealing with a quite separate aspect of the Convention. Lord Clyde in the Inner-House, at p. 546E, said that the area of title to sue was one in which the Convention was not necessarily exhaustive. This decision, however, does not sit easily with the idea that the object of the Convention, in the areas with which it deals, was to provide uniformity of application internationally. As Shawcross and Beaumont, Air Law, VII (188) have observed, the rule in civil law countries is that only a party to a contract of carriage, or a principal for whom he was acting, is regarded as the appropriate plaintiff. In common law countries the proper plaintiff is the owner of the goods, whose right to sue depends on his interest in the goods, not on the fact that he may also be a party to the contract. It would seem to be more consistent with the purpose of the Convention to regard it as providing a uniform rule about who can sue for goods which are lost or damaged during carriage by air, with the result that the owner who is not a party to the contract has no right to sue in his own name.

We were not asked to review the Gatewhite case in detail however, and as the point was not fully argued I would not wish to cast further doubt on the decision which Gatehouse J. reached. It is sufficient for present purposes to say that I am not persuaded that we should apply his reasoning to the question which is before us here, which is not concerned with the question of standing or title to sue but with the question whether a person who has an undoubted title to sue under the Convention can pursue a claim outside the Convention where the Convention itself does not provide him with a remedy.

(d) DECISIONS BY THE FOREIGN COURTS

Much of the discussion in both the Outer House and the Inner House in the Court of Session was taken up with a detailed examination of various cases on this topic from the United States of America. All the judges in that court were of the view however that, in the end, no clear guidance was

available from this source to enable them to rely on this material in reaching their decision in the present case. Lord Marnoch observed, 1996 S.L.T. 529, 536C-D, that the Supreme Court had on two occasions in recent times found it either unnecessary or inappropriate to consider the question whether the Convention provided an exclusive course of action for injuries sustained during international air transportation: Air France v. Saks (1985) 470 U.S. 392; and Eastern Airlines Inc. v. Floyd (1991) 499 U.S. 530. The result of his review was that there was no clear or very consistent line of reasoning in these cases to guide him in this area of international air law. Lord Mayfield, 1996 S.L.T. 529, 544C said that it was impossible to draw any clear conclusion as to the state of U.S. law, and Lord Clyde expressed the same view, at p. 547J, having observed earlier that it was pointless and perhaps impertinent to subject all these cases to critical analysis. Lord Allanbridge was able to find support in some of the cases for the view which he had already reached on his examination of the Convention. But in the end he agreed, at p. 542L with the observations of Leggatt L.J. in Sidhu v. British Airways Plc. in the Court of Appeal that, in view of the conflicting nature of these authorities and the fact that the Supreme Court had twice refrained from addressing the present problem, it was necessary to reach a conclusion in this case without any definite aid from the United States. As Leggatt L.J. said in his judgment, it appears that the point is not settled in the United States as between circuits and even in some instances within the same circuit. From his consideration of the cases cited to him he was not prepared to say where the preponderance of current opinion lies in the United States.

I do not think that I can usefully add much to these observations. One could, of course, attempt to prepare an analysis of the various cases which were cited to us in order to show why Metz v. K.L.M. Royal Dutch Airlines, (1979) 15 Avi. 17, 843, Abramson v. Japan Airlines Co. Ltd. (1984) 739 F. 2d 130, Fischer v. Northwest Airlines, (1985) 623 F. Supp. 1064 and Walker v. Eastern Airlines, (1991) 23 Avi. 17, 904, which favour the position of the pursuer and the plaintiffs in this

case, should be rejected in the light of the contrary view expressed in Finkelstein v. Trans World Airlines Inc. (1978) 15 Avi. 17, 379 and Saloom (George) v. British Airways, (unreported), 22 February 1993, U.S. District Court, Southern District of California, Western Region. The Saloom case is of particular interest, as the claims which the court held were governed exclusively by the Convention and could not be made out on the facts arose out of the same incident as that with which we are concerned in this case. There are dicta in some other cases, notably Boehringer-Mannheim Diagnostics Inc. v. Pan American Airways Inc. (1984) 737 F. 2d 456, which support the general view that the Convention provides the sole cause of action where a passenger seeks to establish a claim against an air carrier and is the exclusive remedy. But, as Lord Clyde pointed out, 1996 S.L.T. 529, 547C, these general observations are of little value unless they are based on a clear and precise understanding of what matters are governed by the Convention. I am not confident, with great respect to the many American judges who have participated in this debate, that that has always been the case. I believe that it would be unwise to attempt to reconcile all these dicta, or to try to subject each of the various decisions to analysis in order to extract from them a view which one could be confident would be regarded as authoritative.

In any event, as Mr. Webb pointed out, the United States is only one jurisdiction among many. Although the volume of litigation in that country on aviation matters is substantial and the jurisprudence which has been developed is an important source of information on aviation law generally, views formed there cannot be assumed to be the same as those formed in other jurisdictions which are party to the Convention. Some of the cases in the United States may also be influenced by the question whether the claim for damages was properly to be litigated in the State courts rather than the Federal courts. Lord Diplock in Fothergill v. Monarch Airlines Ltd. [1981] A.C. 251, 284C drew attention to the factors on which the persuasive value of the decisions of a foreign court must depend. These include the reputation and status of the court, and the extent to which the decision is binding upon courts of

co-ordinate and inferior jurisdiction in that country. As matters have developed it will ultimately be for the Supreme Court of the United States of America to offer guidance to the American judges on this issue, and at this stage I do not think that we should attempt to enter into the difficult debate as to how the balance of view is likely to be resolved when the matter is dealt with by that court.

As for the French case to which we were referred, I think that it also must be regarded as being of no persuasive value in the present case. In Ismail A. Mohamed v. British Airways, (unreported), 8 November 1995, 65 passengers and their close relatives, who were all French nationals, claimed damages from British Airways for the consequences of the same events as those which have given rise to the claims which are before us in these appeals. The Tribunal de Grande Instance de Paris reached the view on the facts that the damages claimed were not linked with disembarkation operations as such, and that they could not be linked to those risks inherent in aerial navigation as provided by the Warsaw Convention. In these circumstances the court felt free to determine the law applicable, on the view that the consequential damages claimed were not covered by the field of application of the Convention. French law was applied, and the plaintiffs were found entitled to damages unrestricted by the limits set by article 22 of the Convention.

That, however, was a decision at first instance, and we were told that it is now under appeal. The copy of the judgment with which we have been provided, in an English translation, does not contain a close analysis of the Convention, nor is there any reference to previous decisions on the issue in the French courts or elsewhere. The reasons given do not disclose a detailed examination of the issues raised by the defence. It is reasonably clear however that the case proceeded upon a different view from that which has been taken in the present case, where it is conceded that the claims can properly be regarded as arising out of international carriage of passengers by air.

CONCLUSION

I believe that the answer to the question raised in the present case is to be found in the objects and structure of the Convention. The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the High Contracting Parties without reference to the rules of their own domestic law. The Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals—and the liability of the carrier is one of them—the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law.

An answer to the question which leaves claimants without a remedy is not at first sight attractive. It is tempting to give way to the argument that where there is a wrong there must be a remedy. That indeed is the foundation upon which much of our own common law has been built up. The broad principles which provide the foundation for the law of delict in Scotland and of torts in the English common law have been developed upon these lines. No system of law can attempt to compensate persons for all losses in whatever circumstances. But the assumption is that, where a breach of duty has caused loss, a remedy in damages ought to be available.

Alongside these principles, however, there lies another great principle, which is that of freedom of contract. Any person is free, unless restrained by statute, to enter into a contract with, another on the basis that his liability in damages is excluded or limited if he is in breach of contract. Exclusion and limitation clauses are a common feature of commercial contracts, and contracts of carriage are no exception. It is against that background, rather than a desire to provide remedies to enable all losses to be compensated, that the Convention must be judged. It was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available. So it set out the limits of liability and the conditions under which claims to estab-

lish that liability, if disputed, were to be made. A balance was struck, in the interests of certainty and uniformity.

All the obvious cases in which the carrier ought to accept liability were provided for. But, as one of the French delegates to the Warsaw Convention, Mr. Ripert, observed (Minutes p. 73) when the definition of the period of carriage was being discussed, there are an infinite variety of cases not all of which can be put in the same formula. No doubt the domestic courts will try, as carefully as they may, to apply the wording of article 17 to the facts to enable the passenger to obtain a remedy under the Convention. But it is conceded in this case that no such remedy is available. The conclusion must be therefore that any remedy is excluded by the Convention, as the set of uniform rules does not provide for it. The domestic courts are not free to provide a remedy according to their own law, because to do this would be to undermine the Convention. It would lead to the setting alongside the Convention of an entirely different set of rules which would distort the operation of the whole scheme.

The Convention is, of course, tightly drawn on these matters. This has been done in the interests of the carrier, whose exposure to these liabilities without the freedom to contract out of them was a principal consequence of the system which it laid down. Were remedies outside the Convention to become available, it would encourage litigation in other cases to restrict its application still further in the hope of obtaining a better remedy, against which the carrier would have no protection under the contract. I am in no doubt that the Convention was designed to eliminate these difficulties. I see no escape from the conclusion that, where the Convention has not provided a remedy, no remedy is available.

For these reasons I would dismiss both appeals.

(2)

Supreme Court, U.S.
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No. 97-475

In The

Supreme Court of the United States

October Term, 1996

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

vs.

TSUI YUAN TSENG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether an airline's Warsaw Convention Article 17 exposure to liability for accidental injuries implicitly renders it immune to suit for egregious willful tort.

2. Whether the district court's disposition of the baggage claim properly complied with the requirements of Article 26 of the Convention.

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COUNTER-STATEMENT OF THE CASE

Petitioner bases its request for *certiorari* on legalisms divorced from the case itself. It "States the Case" without stating what it is about. The result is it seeks review to obtain an advisory opinion on the Warsaw Convention unrelated to the facts proved at trial. The petition's Statement of the Case describes them in a few threadbare words under the Statement's subheading, "Nature of the Case":

> Plaintiff was escorted into a private EL AL security room where her baggage and person were searched. EL AL was searching for "[e]xplosives in any size, detonators ... from small, like the cap of the pen, and ... up from that." Defendant did not, at any time, use force to question or search plaintiff and plaintiff did not, at any time, object to the search.

If that was all there was to it, there would have been no case to start with. Wholly omitted by Petitioner is its willful humiliating violation of Respondent's body and liberty, amounting to assault and battery and false imprisonment in New York State where the cause arose, all proved and deemed true when considering the dismissal which the Second Circuit reversed and petitioner now asks the Court to review. Simply seeking to visit Israel on a vacation, she was handled like an imprisoned criminal without rights before being permitted to board her flight.

At bottom, petitioner seeks review of its claim that the Warsaw Convention be construed to immunize airlines from liability for injuries due to their willful misconduct while allowing passenger suits against them if injury is caused by accident.

A more truly stated "Nature of the Case", referring to the trial record which portrays it more accurately, follows:

A. Nature Of The Case

Respondent, a New York citizen, was a clinical nutritionist employed by Beth Israel North Medical Center for 22 years (A51-2).* She had booked passage on El Al flight 008, New York to Tel Aviv, departing JFK International Airport May 22nd, 1993, where Defendant maintained and operated terminal facilities for departing passengers (A19-20).

On the scheduled date, plaintiff appeared at Petitioner's facilities for the flight. (A20) She presented her ticket and American passport (A21, 54-55), was interviewed and taken by a man in uniform into a small room, and the door closed (A55-58). She was confined there for over an hour (A63).

Imprisonment was conceded with binding force. El Al's proposed Finding #3 (A25):

> Plaintiff was not free to leave the area where she was interviewed unless she declined to board EL AL flight 008.

She was never given the option. She was kept confined, made to loosen and lower her blue jeans some four inches to mid-hip level (A59-60) and be searched by a uniformed female El Al employee. All parts of her body, from head to toe including her "private parts", were manually palpated in such a manner in the small closed room that she felt she was being raped. (A61). She was not given a choice to forfeit the flight and leave.

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* "A" references are to Court of Appeals Appendix.

The feeling of her body took some ten to fifteen minutes (A61-62). The search included the touching and squeezing of her breasts (A86) and hands-on palpation of her body included the portions of her body between her legs, including her vagina (A87).

Petitioner's characterization of Respondent's response to this treatment in its "Nature of the Case" as not "object[ing] to the search" should not connote that she consented to it. The record shows she was helplessly overawed by Petitioner's uniformed security personnel's display of authority and the traumatized Respondent perforce bowed to it.

> I was just like locked up in this little room with all the police [sic] there.

(A61).

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S MAIN OBJECTION TO THE RULING OF THE SECOND CIRCUIT IS THAT IT REFUSED TO GIVE AN ABSURD AND IRRATIONAL CONSTRUCTION TO THE WARSAW CONVENTION.

A consent to search is not deemed voluntary in New York when one bows to a display of authority. *People v. Cameron*, 48 A.D. 2d 783, 369 N.Y.S. 2d 418 (1975). This is no consent at all. But horrifying as the experience was to plaintiff, its conduct was not "accidental" but standard for El Al (A113, 118).

Under New York and generally accepted common law principles, Petitioner's conduct amounted to intentional assault

and battery and false imprisonment.[1] Petitioner asks the Convention that allows airline exposure to liability for accidental injuries be implied to give it immunity in this case.

Below Petitioner had argued the treatment accorded Respondent was accidental and within the limitation to accidental "bodily injury" of Article 17, which excludes traumatic stress or psychic injury as compensible (*Eastern Airlines v. Floyd*, 499 U.S. 530). Now Petitioner concedes it was not "accidental" under Article 17 of the Warsaw Convention, as the Second Circuit ruled following *Air France v. Saks*, 470 U.S. 392, 397 (Petition Appendix, 11a-14a). On a new tack, it urges that since it was not accidental, the very egregiousness of its tort benefits and shields it from liability.

This hoped-for construction of the treaty is preposterous. It is at odds with the teaching of this Court and others to avoid absurd irrational statutory constructions. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *United States v. One Parcel of Real Estate*, 41 F.3d 1448, 1452 (11th Cir. 1995). Petitioner's proposed construction is one of them. The Second Circuit noted the absurdity.

> Such a reading would lead to the absurd

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1. *Maines v. Cronomer Val. Fire Dept.*, 50 N.Y. 2d 535, 545-6, 429 N.Y.S. 2d 622 (1980); *Broughton v. State of New York*, 37 N.Y. 2d 451, 458, 373 N.Y.S. 2d 87 (1975), *cert. denied*, 96 S. Ct. 277; *Jones v. State of New York*, 33 N.Y. 2d 275, 352 N.Y.S. 2d 169 (1973); *Schloendorff v. The Society of the New York Hospital* (*per* Cardozo, J.), 211 N.Y. 125, 105 N.E. 92 (1914); *Villanueva v. Comparetto*, 180 A.D. 2d 627, 580 N.Y.S. 2d 30 (1992); *Laurie Marie M. v. Jeffrey T.M.*, 159 A.D. 2d 52, 559 N.Y.S. 2d 336 (1990); *Staudacher v. City of Buffalo*, 155 A.D. 2d 956, 547 N.Y.S. 2d 770 (1989); *Oates v. New York Hospital*, 131 A.D. 2d 368, 370, 517 N.Y.S. 2d 6 (1987); *Jones v. State of New York*, 96 A.D. 2d 105, 468 N.Y.S. 2d 223 (1983); *Noschese v. City of New York*, 53 A.D. 2d 566, 384 N.Y.S. 2d 822 (1976); *Budgar v. State of New York*, 98 Misc. 2d 588, 414 N.Y.S. 2d 463 (1979).

> result of allowing carriers to escape liability for their negligence — or even their intentional torts — so long as the event giving rise to the injury was not an accident.

Tseng, Pet. p. 20a.

II.

THE SUPPOSED NEED FOR "UNIFORMITY" IN CONSTRUING THE CONVENTION FOR CHOICE OF LAW PURPOSES HAS BEEN REJECTED BY THIS COURT.

The judgment of the House of Lords in *Abnett v. British Airways PLC*, 1 All. E.R. 193 (H.L. 12 December, 1996) lends no support to El Al's contention that the Warsaw Convention renders it immune to common law claims for willful wrongdoing. Intentional tort was not involved in *Abnett*. Negligence and breach of implied contract of reasonable care were. The opinion by Lord Hope of Craighead related to common law passenger claims for damages due to a flight delay in Kuwait allowing the passenger to be taken prisoner by the invading Iraqis. Article 17 did not apply. In context of the non-willful wrongdoing case before the Lords, Lord Hope ruled that Article 17 nonetheless was the exclusive remedy for passengers. He rested on a felt need for uniformity in construing the Convention.

While avowing a pursuit of uniformity, Lord Hope omitted to note this Court's landmark *Zicherman v. Korean Air Lines Co., Ltd.*, __ U.S. __ , 116 S. Ct. 629, 636 (16 January, 1996), which came down almost a year earlier and flatly rejected uniformity as a guiding principle in Convention construction.

The most natural reading of this Article is

that, in an action brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for.

Congress may choose to enact special provisions applicable to Warsaw Convention cases, as some countries have done. See *supra*, at 635. Absent such legislation, however, Articles 17 and 24(2) provide nothing more than a pass-through, authorizing us to apply the law that would govern in the absence of the Warsaw Convention. There is little doubt what that law is in this case.

* * *

The Convention neither adopted any uniform rule of its own nor authorized national courts to pursue uniformity in derogation of otherwise applicable law. Petitioners argue, in effect, that the Convention contains an implicit authorization for national courts to create uniformity between over-land and over-sea accidents governed by their respective domestic laws, even though it leaves the vast discrepancies among the various domestic laws untouched. That is most unlikely.

* * *

We conclude that Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave

> the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules.

116 S. Ct., 634, 636.

The Second Circuit below (Pet. p. 21a) followed *Zicherman's* guidance and pointed to the flaw in the Fifth Circuit's approach:

> The second argument advanced in support of holding the Convention wholly exclusive is that permitting state law claims under any circumstances contravenes the Convention's goal of uniformity. *See Potter,* 98 F.3d at 885. This argument is flawed in two respects. First, while uniformity is certainly one of the two primary goals of the Convention, such a goal has not always been found feasible in all areas if international travel. Second, even where possible, uniformity cannot justify altering the operating structure of the Convention. *See Zicherman,* 116 S. Ct. at 636 * * * We have read *Zicherman* to instruct specifically that the Convention expresses no compelling interest in uniformity that would warrant us in supplanting an otherwise applicable body of law, here state law. * * * Even to accept the argument that uniformity should prevail where the Convention does not apply does not support the ultimate proposition that the Convention must therefore supply the exclusive remedy, because uniformity could be achieved equally as well by allowing recovery outside

> the Convention, under a uniform body of law. Of course, once the Convention is ruled inapplicable the carrier may, in a liability suit against it under domestic law, interpose all the defenses available to it under that law.

Treating the Fifth Circuit's palpably erroneous view in *Potter* as posing a serious conflict with the Second Circuit in *Tseng* misses the point: the Fifth Circuit's serious conflict is with this Court's *Zicherman*, which *Tseng* faithfully follows. This is no basis for granting *certiorari* for review of the Second Circuit *Tseng* decision.

In *Zicherman v. Korean Air Lines Co.*, 116 S. Ct. 629, referring to Article 24(2).[2] the Court held (116 S. Ct., 634):

> The most natural reading of this Article is that, in an action brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for.

Saavedra v. Korean Air Lines, 93 F.3d 547, 551 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 584:

> [The *Zicherman*] Court rejected the district Court's theory that damages are recoverable

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2. Article 24(1) "In the cases covered by Articles 18 and 19 any actions for damages, however founded, can only be brought subject to the conditions and limits set out in this convention".

Article 24(2) "In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights".

> directly under the Warsaw Convention. The Court explained that "damage" in Article 17 refers to "legally cognizable harm," and that adjudicating courts are to determine what harm is legally cognizable only by referring to domestic law. 116 S. Ct. at 634.

Zicherman v. Korean Airlines Co., 116 S. Ct. 629, faithfully followed by the Second Circuit in *Brink's Limited v. South African Airways*, 93 F.3d 1022 (8/8/96), and *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1 (9/9/96), joined by the Eleventh Circuit more recently in *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (8/25/97), underlies the holding in *Tseng* that "uniformity" is no talismanic key for construing the Convention. Indeed, the Supreme Court in *Zicherman* expressly disapproved a Second Circuit holding under review which had made a felt need for uniformity a key to Convention-asserted rights.

Petitioner's misplaced reliance upon *Abnett* to stress the need for uniformity in construing rights of international air travelers is utterly undermined by *Zicherman.*

III.

PETITIONER SEEKS TO READ INTO THE WARSAW CONVENTION CONTRARY TO THE GOVERNING LAW AN UNEXPRESSED PREEMPTION OF THE FOREIGN SOVEREIGN IMMUNITY ACT WHICH MANDATES THE APPLICABLE CHOICE OF LAW RULE IN THIS CASE TO BE THAT OF NEW YORK.

The events in *Zicherman* occurred over the high seas. Domestic choice of laws rules made Death on the High Seas Act (DOHSA) applicable. In the present case involving an "over-land" occurrence in New York, under *Zicherman* principles the

domestic choice-of-law rules under the Foreign Sovereign Immunities Act, specifically 28 U.S.C. § 1606, make New York tort law applicable on the nature of the harm which is legally cognizable. As provided by Section 1606, under circumstances in which it is not entitled to immunity (as here), a

> foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.

Petitioner as a foreign state within the FSIA (28 U.S.C. § 1602, *et seq.*), which availed itself of FSIA in removing the case from state to federal court, is subject to the provisions of § 1606 which make New York law applicable to this New York tort.[3]

As was noted in *Zicherman*, (116 S. Ct., 636)

> Congress may choose to enact special provisions applicable to Warsaw-Convention cases, as some countries have done.

But Congress has not chosen. Neither in FSIA or elsewhere did it choose to enact a special provision excluding airlines owned by foreign states in "international transportation" from state law liability that they would otherwise incur under 28 U.S.C. § 1606 as private individuals "under like circumstances."

For its part, the Convention does not expressly preempt all personal injury law governing passenger suits against airlines. The same Fifth Circuit *Potter v. Delta Airlines*, 98 F.3d 881,

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3. *See First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611. The issue had been raised by Respondent below but was not dealt with by Judge Cardamone in his opinion which reversed the District Court for other reasons.

885, upon which petitioner relies for the repudiated principle of uniformity, noted this, stating it was precisely

> Because the Convention has not expressed the preempted state law, [that *Potter* examined] the test for non-expressed preemption.

Non-expressed preemption of our domestic law by treaties is not allowed. Absent any provision in an international convention which "expressly conflict[s]" with, or preempts, the provisions of the FSIA — and there is none in the Warsaw Convention — the Foreign Sovereign Immunities Act controls. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441-442.

In the light of *Zicherman*, the Court's holding in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, that FSIA mandates application of local state liability rules to it is forcefully brought to bear in this context.

462 U.S. at 622, n.11:

> . . . where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances.

IV.

CONTRARY TO THE GOVERNING LAW PETITIONER WOULD READ INTO IN THE CONVENTION A BAN ON RECOURSE TO STATE LAW FOR NON-ACCIDENTAL WILLFULLY INFLICTED TORTIOUS INJURIES THAT WAS NOT INCLUDED IN IT BY THE SIGNATORIES.

The petition states as the prime "Question Presented for Review":

> (1) Whether the Warsaw Convention, a treaty of the United States, exclusively governs and precludes any recovery for a passenger's injuries sustained in the course of "international transportation" if the injuries were not caused by an "accident" within the meaning of Article 17 of the Convention?

The short answer to that question is no. The Convention does not state that it exclusively governs and precludes non-accidentally caused (or willful tort caused) injury recoveries, and so it does not under *Zicherman*, *Amerada Hess*, *Banco Para El Comercio* and the FSIA. Petitioner offers no compelling reason why the case at bar should present the occasion to re-review this settled law.

The only reference in the Convention to exclusivity appears in Article 24(2). This provides that in

> the cases covered by article 17 ["an action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention"] without prejudice

> to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

The Second Circuit *Tseng* court rightly noted (Pet. p. 15a):

> The provision clearly states that resort to local law is precluded only where the incident is "covered" by Article 17 meaning where there has been an accident * * * , *see Floyd*, 488 U.S. at 535-36. To extend the scope of the Convention's exclusivity beyond that would require rewriting Article 24 or Article 17, a task only the signatories to the Convention may undertake.

It is beyond cavil that the incident herein was not an accident and not covered by Article 17.

Petitioner's statement (Petition, p. 9) that "a right of recourse under state law should not be read into Article 17" stands the question on its head. Petitioner itself does the reading in. It reads into it a denial of that right. More truly put, a ban on recourse to state law for non-accidental tortiously inflicted injuries not expressed in the Convention should not be read into it. *Silkwood v. Kerr-McGee Corp.* 464 U.S. 238, 251 (1984):

> It is difficult to believe that Congress would, without comment, remove all means of recourse for those injured by illegal conduct.

The Convention became a United States treaty by Senate ratification. *Also note Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, *supra.*

Potter v. Delta Airlines, 98 F.3d 881, no more involved a willful tort by an airline (or the effect of the FSIA) than did *Abnett*. A passenger returning to her seat on a privately owned aircraft caught her foot in a carpet in the aisle as she sought to enter the row and sit down, twisting her knee. The court held the circumstances of the case did not fit into the definition of "accident" established in *Air France v. Saks*, 470 U.S. 392, 397. The Fifth Circuit's broadly stated holding that non-accidental injury recoveries against airlines are barred is posited throughout upon the dubious (per *Zicherman*) conclusion that interpretation of the Warsaw Convention is bound by a requirement of uniformity.

The Second Circuit's *Tseng*, now at bar, carefully reviewed the history and language of the Warsaw Convention, and properly concluded that the reading sought by petitioner was unfounded:

> Given the self-described limitation of the Convention, it seems illogical to extend its scope beyond that for which it explicitly provides. It is not tenable to believe the Convention meant to address the more ordinary type of personal injury without some express statement in the text to that effect. Such a reading would lead to the absurd result of allowing carriers to escape liability for their negligence — or even their intentional torts so long as the event giving rise to the injury was not an accident occurring on an airplane or in the course of embarking or disembarking as narrowly circumscribed by the definition of Article 17's meaning.

Pet. App. p. 20a.

V.

PREEMPTION OF THE STATES' COMMON LAW OF PERSONAL INJURY TORTS IS DISFAVORED AND THERE IS PRESUMPTION AGAINST IT.

Were there no FSIA or Section 1606, there remains a strong principled presumption against pre-emption of state common law in the area of personal injury torts. Though there are none here, even legislatively expressed pre-emptive clauses are presumed inapplicable.

Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, dealt with an argued preemption of state common law personal injury claims by a federal statute. Unlike the Convention here, that statute did contain specific preemptive language. The Court noted:

> Throughout our history the several states have exercised their police powers to protect the health and safety of their citizens. Because these are "primarily and historically, . . . matters of local concern," [. . .] the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." [. . .] * * *
>
> As in Cipollone v. Liggett Group, Inc., 505 U.S. 504 [. . .], we are presented with the task of interpreting a statutory provision that expressly pre-empts state law. * * *
>
> * * * because the States are independent sovereigns in our federal system, we have long presumed that Congress does not

> cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," [. . .] we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." * * * we used a "presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express command in Cipollone [. . .]. That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety. * * * It is, to say the least, "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." Silkwood v. Kerr-McGee Corp, 464 U.S. 238, 251 [. . .] (1984).

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, the Court held that it

> never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law * * * and [the Court has] worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act

> unless that was the clear and manifest purpose of Congress.

(514 U.S., 654)

VI.

PETITIONER, RESTING ON *POTTER* AND *ABNETT*, ASKS NO LESS THAN THAT THE COURT, WITHOUT ANY COMPELLING REASON, REVISIT, OVERRULE OR EMASCULATE AT LEAST SEVEN ITS CASES.

Zicherman v. Korean Airlines Co., which it had just decided last year and have the Court consider a 180° reversal and "pursue uniformity in derogation of otherwise applicable law" in construing the Warsaw Convention, which it unanimously had just announced it would not do;

Argentine Republic v. Amerada Hess Shipping Corp., denying treaty preemption to anything less that expressed conflict with domestic law, and no such conflict with FSIA and state law was expressed here;

First National City Bank v. Banco Para El Comercio Exterior de Cuba, holding that the FSIA mandates application of local state liability rules;

Silkwood v. Kerr-McGee Corp., denying implied deprivation of rights for losses due to illegal conduct;

Medtronic, Inc. v. Lohr, holding that the historic police powers of the States were not to be superseded absent an express command;

United States v. X-Citement Video, Inc., holding that absurd statutory constructions are to be avoided;

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company, applying a presumption against pre-emption of state law.

VII.

THE BAGGAGE CLAIM

The Second Circuit correctly found petitioner's challenge to the district court's disposition of the baggage claim to be without merit, and the same should not be allowed frivolously to burden the Court with further review.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

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No. 97-475

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

—v.—

TSUI YUAN TSENG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER IN REPLY TO BRIEF OF RESPONDENT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER IN REPLY TO BRIEF OF RESPONDENT

Petitioner EL AL ISRAEL AIRLINES, LTD. (EL AL) respectfully submits its Reply to the Brief in Opposition of Respondent Tsui Yuan Tseng.

REVIEW OF RESPONDENT'S STATEMENT OF THE CASE

On the issue of treaty construction before the Court, petitioner and respondent agree that respondent's claims arose out of "international transportation" by air within the meaning of

Article 1 of the Warsaw Convention,[1] and further agree that respondent's property damage claim is governed by Article 26 of the Convention. Respondent also concedes that the decision of the court below conflicts directly with the decision of the Court of Appeals for the Fifth Circuit in *Potter v. Delta Air Lines*, 98 F.3d 881 (5th Cir. 1996), and the decision of the House of Lords, the court of last resort of a sister signatory to the Warsaw Convention, in *Abnett v. British Airways plc*, [1997] 1 All E.R. 193 (H.L. 1996) (U.K.). Respondent, however, urges the Court to disregard the direct conflict and to let the decision below remain uncorrected to avoid an arguably harsh result, irrespective of the proper application of this treaty.

ARGUMENT

I

ZICHERMAN V. KOREAN AIR LINES DID NOT ADDRESS THE ISSUE OF EXCLUSIVITY

Zicherman v. Korean Air Lines Co., 116 S. Ct. 629 (1996), concluded that the Warsaw Convention does not provide for uniformity in determining the measure of recoverable damages arising out of "international transportation." 116 S. Ct. at 634. The Court in *Zicherman* did not need to address whether the plaintiff in that case had stated a recoverable claim against the air carrier, or whether the Convention provided that plaintiff's exclusive cause of action. Thus, respondent misstates the holding in *Zicherman* and ignores the Court's express recognition that it has not yet addressed the issue of exclusivity. *See Eastern Airlines v. Floyd*, 499

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000 T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C. § 40105 (1997) (note).

U.S. 530, 553 (1991) and *Air France v. Saks*, 470 U.S. 392, 408 (1985).

II

THE ISSUE OF EXCLUSIVITY WAS PRESERVED FOR REVIEW BY THE COURT

In *Floyd* and *Saks*, the issue of exclusivity was not preserved for resolution by this Court. In this case, however, the issue was presented to the district court and EL AL argued the issue at length in the court below;[2] the exclusivity issue is ripe for review by the Court.

III

PETITIONER'S STATUS AS A "FOREIGN SOVEREIGN" IS IRRELEVANT TO THE ISSUES OF TREATY INTERPRETATION PRESENTED FOR REVIEW

Respondent's digression into the holdings in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), and *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), is unwarranted. Petitioner is not advocating that its liability should be determined in a manner inconsistent with the liability of an air

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[2] In light of the decision of the trial court with respect to remarkably similar facts in *Shen v. Japan Airlines*, 918 F. Supp. 686 (S.D.N.Y.) (Stanton, J.), *aff'd mem.* 43 F.3d 1459 (2d Cir. 1994), petitioner argued to District Judge Stanton in this case that (1) *Shen* compels the conclusion that plaintiff's alleged injuries arose out of an Article 17 "accident" and are not recoverable because plaintiff indisputably did not sustain "bodily injury" and (2) in the alternative, even if the court had found that the claims were not the result of an Article 17 "accident," plaintiff is not entitled to seek recovery under state law because the Warsaw Convention exclusively governs respondent's claims against petitioner. *See Tseng v. El Al Israel Airlines, Ltd.*, 122 F.3d 99, 104 (2d Cir. 1996), Pet. App. 14a.

carrier that does not qualify as a "foreign sovereign" within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1602 (FSIA). State or common law rules of liability are inapplicable to the determination whether a passenger is entitled to recovery from an air carrier for claims arising out of "international transportation" by air within the meaning of the Warsaw Convention, irrespective of whether the carrier is privately owned, publicly traded or is a "foreign sovereign" within the meaning of the FSIA. The FSIA and the Convention "apply concurrently." *Harris v. Polskie Linie Lotnicze*, 820 F.2d. 1000, 1002 n.1 (9th Cir. 1987); *see also Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1027 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997). The FSIA clearly does not provide that treaty law is displaced by state law with respect to claims against "foreign sovereigns" subject to the FSIA.

IV

THE RULES OF STATUTORY CONSTRUCTION ON WHICH RESPONDENT RELIES ARE INAPPLICABLE TO THIS CASE

Respondent's reliance on *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), concerning the interpretation of a federal criminal statute, is misplaced. Unlike a federal statute, a treaty is "solemnly adopted by the governments of many separate nations." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989), and its construction by sister signatories "is entitled to considerable weight." *Tseng*, 122 F. 3d at 106, Pet. App. 19a.

Similarly, respondent's argument with respect to statutory preemption of state law causes of action is ill-founded. *See Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240 (1996); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). Neither interstate nor inter-

national transportation are areas of traditional state regulation and, thus, case law addressing statutory rules of construction relating to express and implied preemption are inapplicable herein. This treaty created a cause of action for air carrier liability arising out of "international transportation" by air of passengers and cargo where previously there had been none. Pet. 12-13 & 8n.

In *Chan v. Korean Air Lines, Ltd.*, Justice Scalia aptly quotes Justice Story's opinion in *The Amiable Isabella*:

> To alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.

Chan, 490 U.S. at 135 (*quoting* Wheat. 1, 5 L. Ed. 191 (1821)).

The Court should grant the petition for writ of certiorari in this case to resolve the fundamental and recurring issue of the proper interpretation of the Warsaw Convention. Respondent's assumption that the view of the Second Circuit will eventually be the majority view of the circuit courts of appeals and, therefore, the "correct" view on the issue of exclusivity, is based on distaste for an undesirable result. The Court should uphold the provisions of this treaty, even if there may not be a remedy for every alleged wrong. *Compare Eastern Airlines v. Floyd*, 499 U.S. 530 (1991) (passengers who indisputably suffered emotional distress not entitled to any recovery for lack of "bodily injury" as required by Article 17).

The Court should reject respondent's position that the proper construction of this treaty will be reached by simply accepting the evolving "majority rule" of the circuit courts of appeals. As observed by Justice Scalia:

> The object of our granting writs of certiorari on points of statutory or treaty interpretation is to determine the

> correctness of fundamental points that lower courts have resolved, not to assume those points to be correct in order to decide particular cases on reasoning useless elsewhere.

Chan, 490 U.S. at 134, 5n.

The proper construction of a treaty of the United States does not rest on a tally of the decisions of the circuit courts of appeals as rendered, but rather should be resolved by the Supreme Court as the ultimate arbiter of the proper construction and application of a treaty to which the United States is a party.

CONCLUSION

For the foregoing reasons as well as the reasons set forth in the Brief of Petitioner filed September 11, 1997, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 29, 1997

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IN THE

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OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

—v.—

TSUI YUAN TSENG,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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—v.—

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The International Air Transport Association (IATA) respectfully moves to file the attached Brief as *amicus curiae* in this case. The consent of counsel for the petitioner was obtained. The consent of counsel for respondent was requested and refused.

The interest of IATA in this case stems from the fact that its 258 member airlines[1] consider that this case presents issues of national and international importance which warrant review by the Court. IATA's interest and position are set forth more fully in its Brief attached to this motion.

[1] IATA Active and Associate Members are listed in the Appendix hereto.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1997

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EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

—v.—

TSUI YUAN TSENG,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF INTERNATIONAL AIR TRANSPORT ASSOCIATION AS *AMICUS CURIAE*

The International Air Transport Association (IATA) respectfully submits this Brief *amicus curiae* in support of the Petition of EL AL Israel Airlines, Ltd. (EL AL) for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit with respect to its decision in *Tseng v. EL AL Israel Airlines, Ltd.*, 122 F.3d 99 (2d Cir. 1997), *petition for cert. filed*, No. 97-475, 66 U.S.L.W. 3203 (U.S. Sept. 11, 1997).[1]

[1] Pursuant to Sup. Ct. R. 37.6, IATA discloses that petitioner EL AL Israel Airlines, Ltd., as a member of IATA and on its own behalf, authored this brief in substantial part and bore the expense of printing the brief.

The Nature of IATA's Interest

IATA is an organization of 258 international and domestic air carriers, including substantially all of the scheduled international air carriers, the majority of which are either owned by or controlled by sovereign nations. Many of its member airlines carry passengers, baggage and goods to and from the United States and, therefore, are subject to litigation in the United States. IATA provides, *inter alia*, coordination and leadership for the efforts of the world's airlines to achieve uniformity with respect to the interpretation of various international agreements affecting aviation, and it seeks to promote safe, regular and economical air transportation for the benefit of the peoples of the world. IATA was organized pursuant to a Special Act of the Canadian Parliament (September 1945) with its Head Office in Montreal, Quebec.

REASONS FOR GRANTING THE WRIT

The questions presented by the decision of the court below are of substantial importance to the international airline industry and consequently, IATA. The goal of uniformity with respect to the law applicable to liability in international air transportation conducted to and from all countries of the world has been dealt a substantial blow by the conflict of the decision below with the decision of the Court of Appeals for the Fifth Circuit in *Potter v. Delta Air Lines*, 98 F.3d 881 (5th Cir. 1996), and the decision of the House of Lords of the United Kingdom in *Abnett v. British Airways plc*, [1997] 1 All E.R. 193 (H.L. 1996) (U.K.). The inconsistent interpretations of Article 17 and related provisions of the Warsaw Convention[2] by the Circuit Courts of Appeals are contrary to a main purpose of the Convention, which was to attain uniformity

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000 T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C. § 40105 (1997) (note).

with respect to liability arising out of international air transportation of passengers, baggage and goods. The decision thus greatly affects the member airlines of IATA.

In recognition of the dissatisfaction of many members of IATA and parties to the Convention, such as the United States, with respect to the low liability limit for passenger injury or death, IATA spearheaded an "umbrella accord" undertaking to waive the limitations of liability as set out in the Warsaw Convention, Hague Protocol (1955),[3] Montreal Agreement of 1966[4] and/or limits otherwise previously agreed to by carriers or imposed by governments. On July 31, 1996, IATA filed with the United States Department of Transportation (DOT) an Application seeking approval of the IATA Intercarrier Agreement on Passenger Liability (IIA) and the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA).

On January 8, 1997, the DOT issued an Order on reconsideration which approved the IIA, now signed by nearly 100 carriers around the world and the MIA, currently signed by nearly 60 carriers. *See International Air Transportation Association: Agreement Relating to Liability Limitations of the Warsaw Convention*, approved by D.O.T. Order 97-1-2, 1997 WL 4834 (D.O.T. Jan. 8, 1997). Under this DOT Order, those carriers which accept the mandatory provisions of the MIA by filing tariffs agree not to avail themselves of the limitation of liability under Article 22(1) or the 1966 Montreal Agreement. However, the Warsaw Convention system defenses will remain available, in whole or in part, to the carriers signatory to the Agreement, unless a carrier decides to waive them or is so required by a governmental authority.

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[3] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on October 12, 1929, September 28, 1955, 478 U.N.T.S. 371.

[4] *See* 49 U.S.C. § 1471 (1997).

Thus, even with respect to those air carriers which have filed their conditions of carriage and amended their tariff rules, the right of a potentially unlimited recovery for passenger injury or death arising out of "international transportation" still requires resolution of the issue of exclusivity of the Convention.

The decision below, finding that the Warsaw Convention does not provide a plaintiff's exclusive right of recourse against an air carrier for claims arising out of "international transportation" within the meaning of Articles 1 and 17 of the Convention, is in accord with the decision of the United States Court of Appeals for the Third Circuit in *Abramson v. Japan Airlines Co. Ltd.*, 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985), but is directly contrary to the interpretation of the Convention by the United States Court of Appeals for the Fifth Circuit in *Potter v. Delta Air Lines*, and also the House of Lords of the United Kingdom in *Abnett v. British Airways*. The uncertainty as to liability for claims arising out of "international transportation" by air manifested by the decision below could be wholly eliminated in the United States if the Court grants the petition for a writ of certiorari.

Moreover, in conjunction with IATA's attempts to attain uniformity in the area of transportation documentation, its members have adopted Resolutions that extend the time limits within which a claimant must provide notice in writing of a cargo or a baggage claim. *See* IATA Resolution 600b(II) and 724, respectively.[5] The fraud exception to the written notice requirement under Article 26 of the Warsaw Convention, however, has not been waived with respect to baggage or goods claims and thus remains applicable.

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[5] There are IATA resolutions and recommendations on varied subjects involving international aviation. Although adopted by airlines, before becoming effective they are approved by governments. Several governments rely upon IATA to develop the uniformity of documentation necessary for international air transportation.

The court below has lowered the standard from fraud to a lack of interest in a claim on the part of any alleged employee of an air carrier and, thus at the stroke of a pen, written out of the Convention the written notice of claim provisions which otherwise prevail throughout the world. The court below failed to apply an express treaty condition precedent to liability for damage to baggage or goods.

A court has a duty to give the provisions of a treaty "a fair interpretation, according to the intention of the contracting parties . . . so as to carry out their manifest purpose." *Wright v. Henkel*, 190 U.S. 40, 57 (1903). *Accord Nielson v. Johnson*, 279 U.S. 47 (1929).

IATA, in representing the interests of international air carriers, is keenly aware of the havoc that forum shopping presents to international air carriers in general and to claims governed by the Warsaw Convention in particular. Irrespective of which state or federal court a plaintiff chooses to bring suit against an air carrier, the answer to the question whether the carrier is liable in the United States for a claim arising out of "international transportation" should be the same.

CONCLUSION

The world's air carriers desire a uniform interpretation of the Warsaw Convention, particularly in the United States where the carriers are constantly subject to litigation over the interpretation of this treaty. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 10, 1997

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ADA Air
Adria Airways
Aer Lingus PLC
Aero Asia International (PVT) Ltd.
Aero California S.A. de C.V.
Aero Zambia Ltd.
Aeroflot - Russian International Airlines
Aerolineas Argentinas S.A.
AEROMEXICO (Aerovias de Mexico S.A. de C.V.)
Aeromexpress
AEROPERU (Empresa de Transporte Aéreo del Perú)
Aerosweet Airlines
Affretair (PVT) Ltd.
Air Afrique
Air Algerie (Entr. Nat. d'Expl. de Svsc Aériens)
Air Austral
Air Baltic Corp SIA
Air Botswana Corporation
Air Caledonie International
Air Canada
Air China International Corp.
Air Europa (Air Espana S.A.)
Air France
Air Gabon
Air Inter Europe (Compagnie Air France Europe)
Air Jamaica Ltd.
Air Koryo
Air Liberté S.A.
Air Littoral
Air Madagascar
Air Malawi Ltd.
Air Maldives Ltd.
Air Malta Company Ltd.

Air Marshall Islands
Air Mauritius
Air Moldova International
Air Namibia
Air New Zealand Ltd.
Air Niugini
Air Nostrum L.A.M.S.A.
Air Pacific Ltd.
Air Seychelles Ltd.
Air Tanzania Corporation
Air U.K. Ltd.
Air Ukraine
Air Ukraine International
Air Vanuatu (Operations) Ltd.
Air Zimbabwe Corporation
Air-India
Air Lanka Ltd.
Alaska Airlines Inc.
Albanian Airlines
Alitalia-Linea Aerea Italiana S.p.A.
ALLIANCE (African Joint Air Services)
ALM Antillean Airlines
America West Airlines, Inc.
American Airlines Inc.
ANA (All Nippon Airways CO., Ltd.)
Ansett Australia
AOM French Airlines (AOM-Minerve S.A.)
Ariana Afghan Airlines Co. Ltd.
Armenian Airlines
Augsburg Airways GmbH
Austrian Airlines
AVENSA (Aerovias Venezolanas S.A.)
AVIACO (Aviacion y Corpercio S.A.)
AVIANCA (Aerovias Nacionales de Colombia S.A.)
AVIATECA, S.A.
Azerbaijan Airlines (Azerbaijan Hava Yollari)
Balkan Bulgarian Airlines
Belavia-Belarsuian Airlines

Bellview Airlines Ltd.
Biman Bangladesh Airlines
Braathens S.A.F.E.
British Airways PLC
British Midland Airways Ltd.
Business Air Ltd.
BWIA International Airways Ltd.
Cameroon Airlines
Canadian Airlines International Ltd.
Cargolux Airlines International S.A.
Cathay Pacific Airways Ltd.
Ceske Aeroline/Czech Airlines (CSA)
China Eastern Airlines
China Northern Airlines
China Northwest Airlines
China Southern Airlines
China Southwest Airlines
City Jet
Comair (Pty) Ltd.
Compagnie Aérienne Corse Méditerranée
Continental Airlines Inc.
Continental Micronesia Inc.
COPA (Compania Panamena de Aviación S.A.)
Croatia Airlines DD
Crossair, Ltd. Co. (for Reg. Eur. Air Transp.)
CUBANA (Empresa Consolidada Cubana de Aviacion)
Cyprus Airways Ltd.
Delta Air Lines Inc.
Deutsche BA Luftfahrtgesellschaft mbH
DRAGONAIR (Hong Kong Dragon Airlines Ltd.)
EAT (European Air Transport)
ECUATORIANA (Ecuatoriana de Aviacion S.A.)
Egyptair
EL AL Israel Airlines Ltd.
Emirates
Estonian Air
Ethiopian Airlines Corporation
Farmwings AG

FedEx (Federal Express Corporation)
Finnair Oy
Garuda Indonesia
GB Airways
Ghana Airways Corporation
Gulf Air Company G.S.C.
Hapag Lloyd Flug GmbH
Hunting Cargo Airlines
IBERIA (Lineas Aéreas de España S.A. Ltd.)
Icelandair
Indian Airlines
Inter Air (Inter Aviation Services Ltd.)
Interimpex-Avioimpex
Iran Air, The Airline of the Islamic Republic of Iran
Iraqi Airways
Jamahiriya Libyan Arab Airlines
Japan Air System Co. Ltd.
Japan Airlines Co. Ltd.
JAT (Jugoslovenski Aerotransport)
Jersey European Airways
Kazakhastan Airlines
Kenya Airways Ltd.
KLM Royal Dutch Airlines
Korean Air
Kuwait Airways Corporation
L.B. Limited
LAB (Lloyd Aéreo Boliviano S.A.)
LACSA (Linéas Aereas Costarricenses S.A.)
LAM (Linhas Aéreas de Mozambique)
LAN-CHILE (Linea Aérea Nacional - Chile S.A.)
LAPA (Lineas Aereas Privadas Argentinas S.A.)
LAPSA (Lineas Aereas Paraguayas Soceidad Anonima)
Lauda Air
Lesotho Airways Corporation
Lithuanian Airlines
Loganair Ltd.
LOT (Polskie Linie Lotnieze)
LTU (Luftransport-Unternehmen GmbH & Co.)

LUFTHANSA (Deutsche Lufthansa A.G.)
Lufthansa Cargo A.G.
Luxair (Soc. Lux. de Navig. Aerienne)
Maersk Air I/S
Maersk Air Ltd.
Malaysia Airline System Berhad
MALEV (Hungarian Airlines Public Ltd. Co.)
Manx Airlines Ltd.
MEA (Middle East Airlines Airliban)
Meridiana S.P.A.
Merpati Nusantara Airlines
MEXICANA (Comp. Mexicana de Aviacion S.A. de C.V.)
MIAT Mongolian Airlines
Nigeria Airways Ltd.
Nippon Cargo Airines (NCA)
Northwest Airlines Inc.
Olympic Airways S.A.
Palair Macedonian Airlines
Pan American World Airways, Inc.
Philippine Airlines, Inc.
PIA (Pakistian International Airlines Corp.)
PLUNA (Pluna Lineas Aéreas Uruguayan S.A.)
Polynesian Airlines Ltd.
Portugalia S.A.
Qantas Airways Ltd.
Riga Airlines
Royal Air Maroc
Royal Brunei Airlines
Royal Jordanian
Royal Swazi National Airways Corp. Ltd.
Royal Tongan Airlines
Ryanair Ltd.
SAA (South African Airways)
SABENA
Sumara Airlines
SAS (Scandinavian Airlines Systems)
Saudi Arabian Airlines

Sierra National Airlines
Singapore Airlines Ltd.
Skyways AB
Sochi Airlines - Avioprima
Solomon Airlines
Sudan Airways Company Ltd.
Surinam Airways
SWISSAIR (Swiss Air Transport Co. Ltd.)
Syrian Arab Airlines
TAAG - Angola Airlines (Lineas Aereas de Angola)
TACA International Airlines S.A.
TAESA (Transportes Aéreas Ejecutivos S.A. de C.V.)
TAP - Air Portugal
TAROM (Romanian Air Transport S.A.)
TAT European Airlines
Thai Airways International Public Company Ltd.
TMA (Trans-Mediterranean Airways S.A.L.)
Tower Air Inc.
TRANS BRASIL (Transbrasil S.A. Linhas Aereas)
Transaero Airlines (Joint Stock Company)
Transavia Airlines (Transvia Holland B.V.)
Tunis Air
Turkish Airlines Inc.
TWA (Trans World Airlines Inc.)
United Airlines
UPS Airlines
US Airways, Inc.
VARIG S.A. (Viscao Aérea Rio Grandense)
VASP (Viacao Aérea Sao Paulo S.A.)
VIASA (Venezolana International de Aviacion S.A.)
Virgin Atlantic Airways Ltd.
Wideroe Flyveselskap ASA
YEMENIA Yemen Airways
Zimbabwe Express Airlines

ASSOCIATE MEMBERS

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Air Jamaica Express Ltd.
Air Sank Aviation 1991 (La Ronge Aviation Services Ltd.)
Air Tahiti
Air North Regional
Aloha Airlines, Inc.
Ansell New Zealand
Austral Lineas Aéreas S.A.
Compagnie Africana d'Aviation - C.A.A.
Eagle Aviation Ltd.
East West Airlines
Falcon Aviation AB
Flight West Airines Pty. Ltd.
Gill Aviation Ltd.
Gujarat Airways Ltd.
Hazelton Airlines
Jet Airways (India) Ltd.
Kendell Airlines (Aust.) Pty Ltd.
LADECO Cargo
LADECO, S.A.
Landair International Airlines
Lufthansa City Line GmbH
Malmo Aviation Schedule AB
Modiluft
Mount Cook Airlines
National Airlines Chile S.A.
NEPC Airlines
Pacific Airways Corporation
Pacific Midland Airlines Ltd.
SA Airlink (Pty) Ltd.
Safair Freighters (Pty) Ltd.
Sahara India Airlines Ltd.
SATA Air Acores
Skyline NEPC Ltd.
Spanair
Sun Air

Sunflower Airlines Ltd.
TAM Transportes Aereos Regionais S.A.
TAM Transportes Aéreos Meridionais S/A

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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Petitioner,

v.

TSUI YUAN TSENG,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF *AMICUS CURIAE*

The Air Transport Association of America (ATA) respectfully moves to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari. The ATA did not seek to file the attached brief within the time permitted by Rule 37.1 because it only learned recently of this case and the potential impact on its member airlines. Counsel for Petitioner and Respondent have given their consent for the ATA to file this brief. The ATA has filed verification of that consent with the Clerk and has also notified the Solicitor General, whom the Court has invited to file a brief.

The ATA considers this case to present issues of national and international importance that warrant review by the Court. As set forth more fully in the attached brief, the decision below undermines the continued viability of the Warsaw Convention and profoundly affects the ability of the ATA's members to implement security measures that assure the safety of 50 million passengers carried annually on international flights by the ATA member airlines.

Respectfully submitted,

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WALL STREET JOURNAL, December 16, 1997 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-475

EL AL ISRAEL AIRLINES, LTD.,
Petitioner,

v.

TSUI YUAN TSENG,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Air Transport Association of America (ATA), as *amicus curiae*, supports the Petition of El Al Israel Airlines, Ltd. (El Al) for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.[1]

INTEREST OF THE AIR TRANSPORT ASSOCIATION OF AMERICA

The ATA is an association of 22 U.S. and three foreign airlines.[2] The ATA's U.S. members operate within the

[1] No party to this case had any role in drafting this brief or provided any monetary support for its preparation or filing. Supreme Court Rule 37.6. Counsel for Petitioner and Respondent have consented to the filing of this brief. The ATA has filed verification of that consent with the Clerk and has also notified the Solicitor General, whom the Court has invited to file a brief.

[2] The ATA's members are Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Conti-

United States and in the U.S. foreign commerce. Its foreign members also participate in the U.S. foreign commerce and are subject to suit in the United States. A principal purpose of the ATA is to support its member airlines by promoting airline safety and advocating common industry positions. Since its inception in 1936, the ATA has been involved in the development of international law governing international air transportation.

The decision below threatens to upset the established expectations of governments and airlines with respect to the uniformity and exclusivity of the liability regime for international air transportation.

First, the primacy of the Warsaw Convention's liability regime (especially now that the world's airlines, with strong U.S. government support, have achieved consensus to waive the Convention's liability limits and certain defenses) is at risk of succumbing to the parochial interests of signatory States in limiting the liability exposure of their national airlines by applying their own local laws. If allowed to stand, the decision below will encourage the application of local law instead of the Warsaw Convention to claims arising in international air transportation.

Second, the decision threatens to subject passengers and airlines to different remedies and standards of liability, depending on the country or the local jurisdiction in which the suit is filed.

Finally, by exposing airlines to liability under local law for required security procedures arising in international air transportation, the court's holding could have a chilling effect on airlines in executing their security responsibilities,

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nental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International Airlines, Federal Express, Hawaiian Airlines, KIWI International Air Lines, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and US Airways. The ATA's technical, foreign-flag members are Air Canada, Canadian Airlines International, and KLM-Royal Dutch Airlines.

thereby impairing the ability of the United States to protect the safety and security of its citizens.

STATEMENT

Respondent seeks damages under New York state law for emotional injuries allegedly suffered during a routine airline security search conducted in the United States pursuant to El Al's security program. Respondent suffered no physical harm. El Al conducted the search in accordance with a security program approved by the Federal Aviation Administration (FAA) to screen all passengers and baggage prior to boarding.

The district court concluded that Respondent's injuries were caused by an "accident" within the meaning of Article 17 of the Warsaw Convention.[3] The district court found, however, that the injuries were not "bodily injuries" cognizable under Article 17 and that Article 24 of the Convention[4] preempted state law claims for injuries not compensable under Article 17.

The court of appeals reversed, holding that a security search—being a common incident of international air

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[3] Convention for the Unification of Certain Rules Relating to International Tranportation by Air, October 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (1934), *reprinted in*, 49 U.S.C. § 40105 note (1994). Article 17 of the Convention states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

[4] Article 24 of the Convention states:

> (1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

travel, and not an "unexpected" or "unusual" event—is not an "accident" for purposes of the Warsaw Convention. Finding the conduct not "covered" by Article 17, the court of appeals held that Article 24 did not preempt the personal injury claims and that Respondent could pursue causes of action under state law unfettered by the Convention's liability limitations.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted to review the question whether the Warsaw Convention provides the exclusive remedy for all injuries sustained during international air transportation. Review is warranted because the decision of the court of appeals here directly conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Potter v. Delta Air Lines*, 98 F.3d 881 (5th Cir. 1996), and the decision of the House of Lords of the United Kingdom in *Abnett v. British Airways*, [1997] 1 All E.R. 193 (H.L. 1996).[5]

Review is also warranted because this case presents an important question of federal law that this Court has not decided. The court of appeals' holding that the Warsaw Convention does not apply to certain claims by passengers for injuries sustained during international transportation by air is based on an erroneous premise.

The decision also disrupts the expectation of the international airline industry that the Convention provides the exclusive means of passenger redress. By declaring certain causes of action for injuries sustained in international air transportation to be outside the Convention's coverage, it threatens to disrupt the Convention's uniform liability regime. Moreover, it threatens to upset other international obligations—obligations negotiated with the com-

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[5] The decision of a sister signatory to the Convention is entitled to considerable weight. *Air France v. Saks*, 470 U.S. 392, 404 (1985).

mon understanding of the Convention's exclusivity—governing international air transportation safety.

1. Contrary to the view of the court of appeals, the Warsaw Convention provides the exclusive basis for seeking a remedy for any personal injury incurred during international air transportation. Warsaw Convention, Article 1. This is true whether or not the event can be termed an "accident" for purposes of the Convention.[6] If an "accident" can be found from the facts (as the district court did here) and if the "accident" results in physical injury (which Respondent does not allege), then the Convention provides a remedy.

If, however, an "accident" cannot be found (as the court of appeals held), or if an "accident" is found to have occurred but there is no physical injury (as the district court found), then the Convention does not provide a remedy. *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991); *Air France v. Saks*, 470 U.S. 392. In all cases, however, the Convention's uniformity and exclusivity dictate that parties turn to the Convention—and the Convention alone—in seeking redress for personal injuries incurred in international air transportation.

The lower court's reasoning misconstrues the scope of the Warsaw Convention, as applied by the courts of this country, and effectively rewrites Article 17. The court concluded that if personal injuries arising from mandated security measures were not actionable under state law without regard to the Convention, it would lead to "the absurd result of allowing carriers to escape liability for their negligence—or even their intentional torts—so long as the event giving rise to the injury was not an accident . . . ." Pet. App. 20a. The court of appeals failed to recognize that if an airline conducts a security search in

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[6] As noted (*supra* n.3), an airline is liable under Article 17 of the Convention for injuries sustained in the course of international air transportation that result from an "accident." *See Air France v. Saks*, 470 U.S. at 396.

a negligent or intentionally tortious manner, that activity is certainly unexpected by the passenger and unusual for the airline. Such a search would thus be an "accident" covered by the Convention, and the airline would be liable.

In any event, there is nothing absurd about a treaty that precludes liability where no "accident" within its meaning can be found.

2. A principal purpose of the Warsaw Convention is to establish a system for "regulating in a uniform manner the conditions of international transportation by air in respect of . . . the liability of the carrier." Warsaw Convention, Preamble; *see Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 116 S. Ct. 629, 636 (1996). Thus, Article 1(1) provides that "[t]his Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention, Article 1(1).

In 1995, the ATA and the International Air Transport Association achieved a consensus in principle among the world's airlines to exercise the authority granted by the Convention and waive the Convention's liability limit and certain of its defenses.[7] This major milestone was achieved by the aviation industry, governments, and victims groups working together. Many airlines have implemented the agreement by revising their tariffs and conditions of carriage and terminating their participation in an earlier inter-carrier agreement, known as the Montreal Agreement.[8]

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[7] The Warsaw Convention authorizes airlines to agree to additional liabilities by "special contract." Warsaw Convention, Article 22.

[8] Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, Docket No. 17,325, Order No. E-23680, Agreement CAB 18900 (Civil Aeronautics Board, May 13, 1966). Under the Montreal Agreement, airlines serving the United States agreed to increase the liability limit to $75,000 for passenger injury and death for transportation to, through, or from the United

Other airlines are taking comparable action. Under the new regime, U.S. and foreign airlines:

1) waive the Convention's liability limit for death of, or bodily injury to, passengers;

2) waive the defense of non-negligence for claims up to 100,000 Special Drawing Rights (SDRs);[9] and

3) preserve all other defenses and rights available under the Convention, including any rights of indemnity and contribution.

The Department of Transportation approved this inter-carrier agreement. *See* Docket No. OST-96-1607, Order 97-1-2, 1997 DOT Av. LEXIS 2 (D.O.T. January 8, 1997).

The consensus among the airlines—both foreign- and U.S.-flag—was achieved with the common understanding that the Warsaw Convention provided the exclusive remedy for all injuries incurred during international air transportation. The new regime is intended to secure for U.S. citizens, including the victims of terrorists' attacks, the benefit of a uniform and efficient system providing prompt and adequate compensation for injury or death in international air transportation regardless of the country in which the lawsuit is brought. More important, the new regime's benefits are generally more favorable than the remedies available under the law of many nations.

The precedent established by the court of appeals threatens to take away these benefits for many passengers

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States. Further, the airlines agreed to waive the defense of non-negligence under Article 20(1) of the Convention for claims within that limit.

[9] Special Drawing Rights of the International Monetary Fund are based on exchange rates for U.S., German, British, French, and Japanese currencies. On December 15, one SDR equaled about U.S. $1.35. WALL STREET JOURNAL, December 16, 1997, at C22.

by undermining the principle that the Warsaw Convention provides the exclusive remedy. Exposure to unlimited liability in the United States under federal and state laws, without regard to the Convention, will likely be regarded by airlines as a breach of the understanding upon which this important consensus was based. If permitted to stand, this decision could disrupt the consensus among foreign airlines to waive the liability limits and thus derail this ongoing implementation process.

Equally disturbing is the prospect that, if the Convention is not exclusive, foreign courts will be encouraged to declare particular claims to be outside the Convention's scope, subjecting passengers (including U.S. citizens) to less favorable foreign law and depriving them of these new protections.[10] In this regard, the term "accident" has been interpreted broadly to refer to those events for which compensation should be provided by airlines. The Second Circuit, however, interpreted the term "accident" for the purposes of determining those claims that were "within the

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[10] The Second Circuit's decision relies on Article 24's reference to cases "covered by" Article 17. The 1971 Guatemala City Protocol proposed to amend Articles 17, 22, 24, and 25 of the Convention to make the liability of the carrier absolute and its limits unbreakable. *See* R. Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. AIR L. & COM. 519 (1972). In doing so, the Protocol would delete Article 24's reference to cases "covered by" Article 17 (dealing with death or injury to passengers) and would amend its language to "[i]n the carriage of passengers and baggage any action for damages, however founded, ..." There is no suggestion in the documentation that this change was intended to effect a substantive change in the exclusivity of the Convention. Indeed, although the Senate has not ratified the Guatemala City Protocol, the Senate Foreign Relations Committee, which on several occasions has reported the Protocol favorably to the Senate, viewed the amendment of Article 24 as "mak[ing] clear that actions for damages whether founded upon the 'Convention' or in contract or in tort or otherwise' can only be brought subject to the conditions and limits set out in the Convention." S. REP. NO. 97-45, at 12 (1981); *see also* S. REP. NO. 101-21, at 15 (1990); S. REP. NO. 98-1, Executive B, at 17 (1983).

contemplation of the drafters of the Convention." Pet. App. 20a. This could lead to narrow definitions of the term "accident" in cases brought in foreign courts where national law is significantly less favorable to passengers than the Convention's rules.

3. Countries signatory to the Convention have consistently relied upon the uniformity *and exclusivity* of the Warsaw Convention's liability regime in developing and implementing important international aviation obligations and practices. Security programs required of airlines by countries that have signed the Warsaw Convention, including the United States, involve a complex web of international agreements that are grounded on the view that the Warsaw Convention provides the exclusive recourse for injured passengers. Changing this exclusivity premise threatens to undermine these security measures.

The overwhelming majority of the parties to the Warsaw Convention are also party to the 1944 Chicago Convention, the main purpose of which is to promote safety and order in international civil aviation.[11] Under Annex 17 of that Convention, signatory countries must establish and maintain effective measures to protect the security of international civil aviation. *See* International Civil Aviation Organizaiton (ICAO), *International Standards and Recommended Practices, Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference*, Annex 17 to the Chicago Convention (6th ed. 1997).[12]

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[11] *See* Article 44 of the Convention on International Civil Aviation, December 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295. *See also* NICOLAS M. MATTE, TREATISE ON AIR-AERONAUTICAL LAW 187 (1981).

[12] To further develop a uniform security system, other international agreements to which the United States is party impose on signatory countries requirements designed to counter terrorist acts. *See, e.g.*, Convention on Offenses and Certain Other Acts Committed on Board Aircraft, September 24, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure

While the Chicago Convention and Annex 17 thereto recognize airline security as a sovereign police function, the United States has entrusted airlines with the bulk of that responsibility. Under U.S. law, the Federal Aviation Administrator sets screening standards and requires U.S. and foreign airlines to establish security programs. 49 U.S.C. §§ 44901-44915.

The FAA has extensive regulations regarding the security measures that must be taken by airports (14 C.F.R. Part 107), airlines (14 C.F.R. Part 108), indirect air carriers (such as freight forwarders) who engage indirectly in air transportation of property (14 C.F.R. Part 109), and foreign airlines operating to and from the United States (14 C.F.R. Part 129). Airline security programs must be filed with, and approved by, the FAA. 14 C.F.R. §§ 108.5, 108.7(a)(4).

Congress has also enacted legislation to assure that foreign airports provide safety and security to the flying public. Under Section 551 of the International Security Development and Cooperation Act, Pub. L. 99-83, § 551(a), 99 Stat. 190, 222-25 (1985), the Department of Transportation periodically assesses the effectiveness of security measures maintained at foreign airports through which U.S. travelers pass, applying ICAO standards. 49 U.S.C. § 44907(a)(2)(C).

The elaborate system of international rules governing airline security upon which U.S. law is based was developed with a common understanding among nations that airline liability would be governed exclusively by the Warsaw Convention, which predated those rules by dec-

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of Aircraft, December 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, 24 U.S.T. 564, 10 I.L.M. 1151; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, February 24, 1988, T.I.A.S. 7570, 27 I.L.M. 627.

ades. There has been no recognition that local tribunals can regulate, or otherwise impose liability upon, airlines for the normal implementation of these solemn obligations. "The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *United States v. Stuart*, 489 U.S. 353, 369 (1989); *see also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984); *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933).

The Second Circuit decision ignores this reliance and thus fails to appreciate the effects of its decision on international airline security. It is now well established that the Warsaw Convention governs an airline's liability to passengers for terrorist attacks, including hijacking. *See Air France v. Saks*, 470 U.S. at 405; *see, e.g., Pflug v. Egyptair Corp.*, 961 F.2d 26 (2d Cir. 1992); *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1269 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Margrave v. British Airways*, 643 F. Supp. 510 (S.D.N.Y. 1986); *Salerno v. Pan American World Airways, Inc.*, 606 F. Supp. 656 (S.D.N.Y. 1985).

Accordingly, U.S. courts have made clear that the Convention imposes "close to absolute liability" (Pet. App. 13a) for passenger injury and death arising from an airline's negligence in failing to conduct security searches. *See, e.g., In re Air Disaster at Lockerbie, Scotland*, 37 F.3d 804, 811 (2d Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

The Second Circuit's holding places airlines in an untenable situation. On the one hand, it subjects them to strict liability under the Convention for failing to conduct a search. On the other hand, it subjects them to potentially unlimited liability under the laws of the various states in the United States for conducting such a

search—even where, as here, the search conforms to procedures mandated by U.S. and international law, and approved by the FAA. This result is not only unfair, but plainly inconsistent with the maintenance of an effective security program.

Even more troubling, the airline employees conducting these searches will no longer be able to rely on the Convention as circumscribing their liability. *See Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977). The Second Circuit's decision adds an additional consideration into the mix of complex factors employees weigh in determining whether to search any particular passenger: whether the passenger is likely to sue them for unlimited damages if the search does not disclose a weapon or explosive device. The decision thus not only defeats the Convention's purpose of unifying liability rules for airlines, but also threatens to compromise the security of airlines and passengers.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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25 pp

QUESTIONS PRESENTED

1. Whether a passenger who suffers personal injury within the scope of the Warsaw Convention (which addresses international transportation by air), but who cannot meet the conditions set forth in Article 17 of the Convention for liability under the Convention itself, may nonetheless seek relief under state law.

2. Whether the court of appeals erred in summarily affirming the district court's determination that petitioner's treatment of respondent's claim for lost baggage satisfies the "fraud" exception to the Convention's written notice requirement under Article 26(4).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Convention for the Unification of Certain Rules Relating to International Transportation by Air (1929), 49 Stat. 3000 (49 U.S.C. 40105 note), popularly known as the "Warsaw Convention," was designed to achieve two basic purposes: to "foster uniformity in the law of international air travel," *Zicherman* v. *Korean Air Lines*, 516 U.S. 217, 230 (1996), and to "limit[] the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry," *Eastern Airlines* v. *Floyd*, 499 U.S. 530, 546 (1991). To those ends, the Convention prescribes an extensive set of legal principles generally applicable "to all international transportation of persons, baggage or goods performed by aircraft." Art. 1(1). See generally Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

At the core of the Convention is a series of provisions governing the nature and scope of a carrier's liability for harms occurring in the course of international air travel. The Convention divides such harms into three categories: personal injury (Article 17), damaged or lost baggage (Article 18), and damage due to delay (Article 19). Article 17, which is at issue here, makes carriers "liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." It is now generally accepted that a passenger satisfying the liability criteria set forth in Article 17 may bring a cause of action against a carrier directly under the Convention. See *Benjamins* v. *British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979); *St. Paul Ins. Co.* v. *Venezuelan Int'l Airways*, 807 F.2d 1543 (11th Cir. 1987); *Boehringer-Mannheim Diagnostics, Inc.* v. *Pan Am World Airways*, 737 F.2d 456, 459 (5th Cir. 1984), cert. denied, 469 U.S. 1186 (1985); *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 408-415 (9th Cir. 1983); cf. *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1282 (2d Cir.), cert. denied, 502 U.S. 920 (1991).

At the time of the Convention, carriers commonly made their services contingent on a passenger's contractual waiver of the right to bring suit for personal injury, and such waivers were often enforceable in court. See Pet. 12-13 n.8; Pet. App. 53a-54a. To ensure that carriers could not short-circuit Article 17 (as well as Articles 18 and 19) in that manner, the delegates to the Convention added Article 23, which nullifies "[a]ny provision tending to relieve the carrier of liability." Moreover, to reduce litigation concerning questions of fault, the delegates added Article 20, which, when combined with Article 17, creates a presumption of liability that a carrier can rebut only by

"prov[ing] that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Art. 20(1).

The creation of a non-waivable cause of action for personal injury under Article 17, together with the presumption of liability added by Article 20, was part of a larger compromise designed to balance the interests of passengers against the interests of the nascent airline industry. Two key provisions of the Convention protect that industry's interests. First, Article 22(1) limits the amount that can be recovered in the event of an accident-related death or bodily injury. The delegates to the Convention set that limit at 125,000 francs, the equivalent in 1929 to approximately $4,900 dollars. See Lowenfeld & Mendelsohn, *supra*, 80 Harv. L. Rev. at 499 & n.10; see also *Floyd*, 499 U.S. at 546. That was a "low amount even by 1929 standards," *Floyd*, 499 U.S. at 546, and, over the years, foreign and domestic airlines have entered into voluntary, private agreements to waive major aspects of the liability limitations imposed by the Convention. See *id.* at 549.[1]

Second, as a counterpart to Article 23's prohibition on attempts by carriers to circumvent the Convention's liability regime through contractual waiver clauses, the

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[1] In the most recent such agreement, completed in 1996, several dozen major airlines agreed to waive any limit on compensatory liability for claims arising under, and satisfying the liability conditions of, Article 17. (Punitive damages remain unrecoverable. See generally *Lockerbie*, *supra*; *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991).). Those airlines further agreed to waive the defense of non-negligence under Article 20 (and thereby effectively agreed to strict liability) for such claims in an amount up to 100,000 "Special Drawing Rights," which, at the current exchange rate, equal approximately $135,000. See Pet. App. 8a; *International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention*, approved by D.O.T. Order 97-1-2, 1997 WL 4834 (D.O.T. Jan. 8, 1997).

delegates added a provision barring passengers from seeking to circumvent that regime, and in particular its limitation on damages, by bringing suit under domestic law outside the terms of the Convention. That provision, Article 24, gives preemptive effect to Articles 17, 18, and 19, which, as discussed, respectively address a carrier's liability for personal injury, damaged or lost baggage, and delay.

Article 24(1) addresses the latter two categories of liability: "In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Article 24(2) then addresses personal injury: "In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." The delegates added the final clause ("without prejudice to the questions * * *") because they could not reach consensus on the availability of wrongful death actions and, more generally, on "the questions of who may recover and what compensatory damages are available to them," *Zicherman*, 516 U.S. at 225; those secondary questions they therefore "left to domestic law." See *ibid.*; see also, *e.g.*, *Dooley* v. *Korean Air Lines Co., Ltd.*, No. 97-704 (to be argued Apr. 27, 1998). In contrast, the delegates could and did agree on rules governing the antecedent question of *which events* would subject carriers to personal-injury liability, and those rules appear in Article 17. The principal dispute in this case is whether *those* rules are exclusive: whether, despite Article 24, a plaintiff may sue for personal injury under local law if she cannot satisfy the conditions of liability under Article 17 for events occurring within the scope of the Convention.

2. a. On May 22, 1993, respondent Tsui Yuan Tseng arrived at John F. Kennedy International Airport in New York to board a flight to Tel Aviv. Pet. App. 3a-4a. The

flight was provided by petitioner El Al Israel Airlines, Ltd., a carrier principally owned by the State of Israel. C.A. App. A9-A10. Respondent went to El Al's terminal, presented her ticket and U.S. passport to an El Al security guard, entered the terminal building, and proceeded to a security area, where she was asked routine questions about her destination. Pet. App. 4a. Based on her answers, which the security guard considered "illogical," respondent was classified as a "high risk" passenger. *Ibid.*

Respondent was taken to a private room, where she was subjected to a security search for explosives and detonating devices. She was told to lower her pants to mid-hip level and to remove her shoes, jacket, and sweater. A female security guard then conducted an exhaustive manual search of respondent's entire body outside of her clothing. The search lasted 15 minutes. It conformed to El Al procedures, which had been adopted pursuant to Federal Aviation Administration regulations. Pet. App. 4a. The parties appear to agree that respondent did not object to the search and that she had the option of refusing to submit to it, thereby forfeiting the right to board the flight. The parties appear to disagree, however, about whether respondent was told (or should reasonably have known) that she could assert that option. See Br. in Opp. 2-3.

After the search, El Al personnel determined that respondent did not present a security risk, and they permitted her to board the flight. Respondent later testified that she was "really sick and very upset" during the flight, that she was "emotionally traumatized and disturbed" during her month-long trip to Israel and thereafter, and that she ultimately had to undergo medical and psychiatric treatment. Pet. App. 4a. Respondent did not claim, however, to have suffered any physical injury. *Id.* at 4a-5a, 28a.

b. Respondent brought suit in state court. She alleged that petitioner "assaulted, and falsely imprisoned and physically and mentally abused her," and she sought $5

million in damages under state-law theories of tort. C.A. App. A13. Petitioner removed the case to federal court pursuant to 28 U.S.C. 1441(d), which authorizes the removal of any action against a "foreign state" as defined in 28 U.S.C. 1603(a). Pet. App. 5a; see C.A. App. A9-A10.

After discovery and a trial, the district court dismissed respondent's claim for personal injury. Pet. App. 26a-28a. The court first noted that Article 17 creates a cause of action only for injuries suffered as a result of an "accident," which this Court has defined as "an unexpected or unusual event or happening that is external to the passenger." Pet. App. 26a (quoting *Air France* v. *Saks*, 470 U.S. 392, 405 (1985)). The court determined that, because petitioner "erroneously" subjected respondent to an "unexpected" full-body search, the search "is fairly accurately characterized as an accident," and the Convention therefore "applies." *Id.* at 27a-28a. The court then dismissed respondent's personal injury claim on the ground that Article 17 allows recovery only for bodily injury and not for the purely psychic injury that respondent had alleged. *Id.* at 28a (citing *Floyd*, 499 U.S. at 552).

c. The court of appeals reversed. Pet. App. 1a-23a. The court first ruled that the search did not qualify as an "accident" within the meaning of Article 17, reasoning that security searches "are an anticipated aspect of international travel," that the search at issue "was part of the airline's normal procedure," and that "the Convention does not aim to derogate from the efforts of international air carriers to prevent violence and terrorism, efforts which are widely recognized and encouraged in the law." Pet. App. 11a-12a. As a result, "under the terms of Article 17 of the Warsaw Convention, [petitioner] may not be held liable in damages to [respondent]." *Id.* at 14a.

The court then held, however, that the Convention does not provide the exclusive cause of action for passengers who sustain personal injuries in the course of interna-

tional air travel. Pet. App. 14a-22a. According to the court, Article 24 "clearly states that resort to local law is precluded only where the incident is 'covered' by Article 17, meaning where there has been an accident, either on the plane or in the course of embarking or disembarking, which led to death, wounding or other bodily injury." *Id.* at 15a. To preclude resort to local law where a plaintiff cannot meet the liability criteria under Article 17, the court believed, "would require rewriting Article 24 or Article 17, a task only the signatories to the Convention may undertake." *Id.* at 15a-16a.

The court sought support for its construction of Article 24 in the drafting history of the Convention, Pet. App. 16a-17a, and in the Convention's underlying purposes, *id.* at 18a-23a. The court recognized that "one of the two primary purposes of the Convention was to shield carriers from financial catastrophe following in the wake of a major accident," but it concluded that "the Convention does not purport to insulate carriers from the ordinary risks of doing business, such as keeping their facilities in good repair." *Id.* at 19a. Finally, the court held that, as interpreted by this Court in *Zicherman*, "the Convention expresses no compelling interest in uniformity that would warrant us in supplanting an otherwise applicable body of law, here state law." *Id.* at 21a.

DISCUSSION

The court of appeals held that, despite Article 24 of the Warsaw Convention, a passenger who suffers personal injury in the course of international air travel, but who cannot meet the conditions set forth in Article 17 for liability under the Convention itself, may nonetheless seek relief under state law. That decision, like the Third Circuit's similar decision in *Abramson* v. *Japan Airlines*, 739 F.2d 130 (1984), cert. denied, 470 U.S. 1059 (1985), conflicts with the decisions of the Fifth Circuit in *Potter* v. *Delta Air*

Lines, 98 F.3d 881 (1996), and of the British House of Lords in *Abnett* v. *British Airways PLC*, 1 All E.R. 193 (1996) (Pet. App. 34a-65a). Because the legal issue on which those courts have split is recurring and important, this Court should grant the petition for a writ of certiorari, but limit review to the first question presented.

1. a. The substantive scope of the Convention is defined in Article 1(1), which provides that "[t]his convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft," either "for hire" or "gratuitous[ly]." That language is quite general, and Article 17 clarifies that, in the specific context of suits for personal injury, the Convention addresses a carrier's liability to "passenger[s]" for harms occurring "on board the aircraft or in the course of any of the operations of embarking or disembarking." See generally *Air France* v. *Saks*, 470 U.S. 392, 401-402 (1985). Because the Convention's preemptive effect on local law extends no further than the Convention's own substantive scope, a carrier is indisputably subject to liability under local law for injuries arising outside of that scope: *e.g.*, for passenger injuries occurring before "any of the operations of embarking." Cf. Pet. App. 20a-21a (expressing concern that wrongdoers not escape liability for accidents on airport escalators).

The question presented here, however, is whether a carrier can be liable under local law for personal injury arising *within* the scope of the Convention—for passenger injury sustained "on board the aircraft or in the course of any of the operations of embarking or disembarking"—if the injured party cannot meet the conditions set forth in Article 17 for liability under the Convention itself. There are two principal circumstances in which that issue of "exclusivity" arises. The first is where the event causing the plaintiff's injury does not qualify as an "accident" within the meaning of Article 17 because it was not

"unexpected or unusual" and "external to the passenger." *Saks*, 470 U.S. at 405 (hearing loss caused by normal loss of cabin pressure does not qualify as "accident"). The second is where, irrespective of whether the harm-causing event was an "accident," the harm itself does not take the form of "death or * * * bodily injury" within the meaning of Article 17. See *Eastern Airlines* v. *Floyd*, 499 U.S. 530 (1991) (Article 17 does not create cause of action for mental anguish caused by closely averted crash). In each of those circumstances, this Court has expressly declined to address whether a plaintiff, unable to seek recovery under the Convention, may nonetheless bring a cause of action under state law. See *Saks*, 470 U.S. at 408; *Floyd*, 499 U.S. at 553.

That issue of exclusivity is now ripe for this Court's review. The Second Circuit's decision in this case, like the Third Circuit's decision in *Abramson*, is in irreconcilable conflict with the Fifth Circuit's decision in *Potter* and with the House of Lords' recent decision in *Abnett*. See Pet. App. 18a-21a (noting conflict with *Potter* and *Abnett*, which court identified as *Sidhu* v. *British Airways PLC*); *Krys* v. *Lufthansa German Airlines*, 119 F.3d 1515, 1518 n.8 (11th Cir. 1997) (noting circuit conflict on issue presented here, but declining to resolve issue because it had not been properly preserved), cert. denied, 118 S. Ct. 1042 (1998). This Court's review is necessary to resolve that conflict for the benefit of American courts as well as foreign courts, which often look to this Court for guidance in interpreting the Warsaw Convention. See, *e.g.*, Pet. App. 63a. This particular case also presents important policy concerns about the extent to which routine security searches can subject a carrier to liability under domestic law.[2]

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[2] For much of the life of the Convention, the United States has engaged in multilateral negotiations with other signatories in efforts to

b. In our view, this case is an appropriate vehicle for deciding the exclusivity issue that has split the courts. First, the parties and courts below have all assumed—correctly, we believe—that the security search in question, although conducted in an airport terminal building before the flight, occurred in "international transportation" (Art. 1(1)): that is, "in the course of any of the operations of embarking or disembarking" (Art. 17). See, *e.g.*, Pet. App. 14a.[3] It is therefore undisputed that, in that respect, the events at issue fall within the scope of the Convention as defined by Articles 1(1) and 17.

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reform the legal regime arising under the Convention. Under the auspices of the International Civil Aviation Organization (ICAO), the United States is currently engaged in such negotiations, and (as part of a comprehensive package of proposed amendments) has agreed to a proposal to clarify the language of Article 24 to confirm the broad extent of the Convention's exclusivity in personal injury cases: "In the carriage of passengers, baggage, and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention[.]" Approved Draft of the Legal Comm., ICAO, Proposed Art. 23(1) (May 9, 1977). Those negotiations, however, are at a very early stage, and they accordingly do not warrant deferral by this Court of a resolution of the important question presented here.

[3] In determining whether a plaintiff was injured during operations of embarkation, the courts of appeals focus on the plaintiff's location and activity and on the extent to which the airline exercised control over the plaintiff at the time the injury occurred. See, *e.g.*, *Schroeder* v. *Lufthansa German Airlines*, 875 F.2d 613, 617 (7th Cir. 1989); *Evangelinos* v. *Trans World Airlines*, 550 F.2d 152, 155 (3d Cir. 1977) (en banc); *Martinez Hernandez* v. *Air France*, 545 F.2d 279, 282 (1st Cir. 1976), cert. denied, 430 U.S. 950 (1977); *Day* v. *Trans World Airlines*, 528 F.2d 31, 33 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976). Cf. *Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256, 1262 (9th Cir.) (applying slightly different "totality of the circumstances" test), cert. denied, 431 U.S. 974 (1977). The security search at issue here would appear to satisfy those tests.

It is also undisputed that respondent could not meet the conditions for liability set forth in Article 17. The court of appeals reached that conclusion on the ground that the search in question was not an "accident" within the meaning of Article 17. See Pet. App. 14a. Although petitioner had urged the court of appeals to affirm the district court's finding that the search was in fact an "accident," petitioner now concedes, for purposes of this Court's review, that the court of appeals' disposition of that threshold issue was correct (see Pet. i (question presented), 7), and respondent agrees (see Br. in Opp. 13). We believe that it would be appropriate for this Court to accept the parties' agreement on that issue: a routine security search that complies with federal standards, as this one apparently did (see Pet. App. 4a), should not be characterized as an "accident." But even if there were some basis for uncertainty about the proper characterization of this search, cf. *Saks*, 470 U.S. at 405; Br. in Opp. 2-3, this case would still present the core question of the Convention's exclusivity. That is so because respondent's claim fails to meet an independent condition for liability under Article 17: she has not alleged that she suffered a "bodily injury" within the meaning of that provision. See Tseng C.A. Br. 16, 19, 20, 24; see also Br. in Opp. 4.[4]

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[4] Disputes about the Convention's exclusivity arise most commonly in cases (such as *Saks*, *Abramson*, and *Potter*) in which the plaintiff has suffered physical injuries but the cause of those injuries was not an "accident," rather than in cases (such as *Floyd*) in which the plaintiff's injuries *were* caused by an "accident" but are not "bodily" in character. In our view, however, the ultimate answer to the exclusivity question should be the same in both situations. Either the Convention permits liability under local law if the liability criteria of Article 17 are unmet, or it does not; there is no persuasive reason why the answer to that question should turn on *which* criterion is unmet. But cf. Pet. App. 27a-28a (seeming to assume that Convention "applies," and is given pre-

Finally, it bears noting that, in both the district court and the court of appeals, respondent relied on Article 25 of the Convention, in part as a basis for "tak[ing] the case outside the Convention's limitations of liability." Pet. App. 27a. Article 25 provides, in relevant part:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wil[l]ful misconduct.

If Article 25 were at issue in this case, it could complicate the exclusivity analysis, because, under one possible interpretation, it forecloses a carrier that has engaged in "willful misconduct" from availing itself not just of the liability limits of Article 22, but also of any provision of the Convention that "exclude[s] * * * liability"—including, perhaps, the core exclusivity provisions of Article 24. But cf. *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1285 (2d Cir.), cert. denied, 502 U.S. 920 (1991).

But Article 25 is not at issue in this case. After trial, the district court specifically found, as a factual matter, that petitioner's actions were not willful. See Pet. App. 27a. In the court of appeals, respondent did not squarely challenge that factual finding as clearly erroneous; instead, in invoking Article 25, she argued principally that the kinds of torts alleged here are "willful" as a categorical matter and that anything "willful" cannot qualify as an "accident" under Article 17. See *id.* at 13a; cf. Tseng C.A. Reply Br. 6. In her brief in opposition in this Court, how-

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emptive effect, if and only if injury-causing event qualifies as an "accident"); *Krys*, 119 F.3d at 1518 n.8 (similar).

ever, respondent does not even cite Article 25 (although, in passing, she continues to characterize petitioner's conduct as "willful," see Br. in Opp. 1, 12, 14). Because respondent has not preserved any argument that Article 25 affects the exclusivity analysis in this case, see Sup. Ct. R. 15.2, and also because the court of appeals left undisturbed the district court's specific factual finding that petitioner's actions were not "willful," we believe that Article 25 presents no obstacle to this Court's review of the exclusivity issue presented here.[5]

c. On the merits, we agree with petitioner that Article 24 bars actions under local law for personal injury in cases in which the plaintiff cannot meet the conditions set forth in Article 17 for liability under the Convention itself. The task of interpreting a treaty "begin[s] with the text of the treaty and the context in which the written words are used." *Floyd*, 499 U.S. at 534 (internal quotation marks and citations omitted). It is inappropriate, however, to expect multilateral treaties, negotiated and drafted by numerous international delegates, to meet the standards of linguistic precision applicable to private contracts and domestic statutes. For that reason, "treaties are construed more liberally than private agreements, and to ascertain their meaning [the Court] may look beyond the written words to the history of the treaty, the negotia-

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[5] Respondent suggests (Br. in Opp. 9-11) that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1602 *et seq.*, provides an independent basis for permitting her state-law suit to proceed. That suggestion is without merit. The FSIA makes a foreign state and its agencies "liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. In this context, that means that the Convention preempts state-law claims against airlines owned by foreign sovereigns to exactly the same extent that it preempts such claims against privately owned airlines. It does not somehow render the former class of airlines *more* susceptible than the latter to claims under state law.

tions, and the practical construction adopted by the parties." *Id.* at 535 (internal quotation marks and citations omitted).

Read together, the two paragraphs of Article 24 provide that, "[i]n the cases covered by article 17," "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Cf. p. 4, *supra* (discussing final clause of Article 24(2)). To paraphrase that provision, "[i]n the cases covered by article 17," an injured plaintiff may sue an airline for personal injury only if she meets all of the "conditions" of, and "limits" on, liability set forth in the Convention. The central question in this case is the meaning of the phrase that triggers that preemptive effect: "cases covered by article 17."

In the governing French text, see *Zicherman* v. *Korean Air Lines*, 516 U.S. 217, 225 n.3 (1996), that phrase reads, "[d]ans les cas prévus à l'article 17," which, literally translated, means "in the circumstances anticipated [or 'foreseen'] in Article 17." See *Cassell's New French Dictionary* 130, 565-566 (1951). There are two ways to interpret that phrase. In respondent's view, and in the view of the court of appeals, the phrase narrowly denotes the cases in which the plaintiff could actually bring a cause of action under Article 17. Under that approach, a plaintiff who could *not* satisfy the liability conditions of Article 17 could nonetheless bring a cause of action under local law, and—precisely because she could not satisfy those conditions—she would be free of *all* of the "conditions and limits set out in this convention."

Under the alternative interpretation, the phrase "les cas prévus à l'article 17" serves as a shorthand for personal injury cases in general—which Article 17 addresses (or "anticipates") comprehensively—and distinguishes that class of cases from cases involving damaged or lost luggage and delay, to which Article 24(1) refers with the

parallel phrase "les cas prévus aux articles 18 et 19" (see *Zicherman*, 516 U.S. at 225 n.3). Under that interpretation, *any* personal injury action brought by a passenger against a carrier for events arising within the scope of the Convention would be "subject to the conditions and limits of this convention." Because those "conditions" and "limits" include Article 17's own substantive criteria for carrier liability, that interpretation of Article 24 would preclude suits under local law where those criteria are unmet: *e.g.*, where the passenger suffered no "bodily injury," see *Floyd*, *supra*, or where the injury did not arise from an "accident," see *Saks*, *supra*. For several reasons, we believe that this is the more faithful reading of the Convention.

First, this reading is consistent with the Convention's explicit textual insistence on international uniformity in the legal principles defining the circumstances under which a carrier will be exposed to liability. (As noted on p. 4 above, those principles are distinct from the remedial issues that the delegates expressly left for resolution under domestic law. See *Zicherman*, 516 U.S. at 230-231.) Indeed, the first substantive sentence of the Convention, contained in the preamble, emphasizes the necessity of "regulating in a uniform manner the conditions of international transportation by air in respect of * * * the liability of the carrier." To achieve such uniformity, the Convention establishes a comprehensive set of legal principles governing the three major categories of liability (including personal injury) associated with international air travel, and it declares that those principles, along with the rest of the Convention, "shall apply to all international transportation of persons, baggage, or goods performed by aircraft." Art. 1(1). It is most unlikely that, despite those textual aspirations to legal uniformity, the Convention was intended to subject carriers to radically *non*-uniform liability under the peculiar legal regimes of the various

signatories for events occurring within the Convention's scope.[6]

The drafting history of the Convention confirms that conclusion. The question of Article 17's exclusivity typically arises in cases in which the event causing a passenger's injury was not an "accident"—in the broad sense applicable in this specialized context—because it was not "unexpected or unusual" and "external to the passenger." *Saks*, 470 U.S. at 405.[7] The addition of the "accident" requirement came late in the drafting process; in the penul-

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[6] The court of appeals erroneously sought support for its contrary position in the fact that the delegates amended the formal title of the Convention "to refer to the unification of '*certain rules*,'" rather than all rules, relating to international transportation by air. Pet. App. 16a-17a. As the House of Lords aptly observed in *Abnett*, however, it is undisputed, and immaterial to the present analysis, that "the Convention is concerned with certain rules only, not with all the rules relating to international carriage by air. * * * Nothing is said in this Convention about the liability of passengers to the carrier, for example. Nor is anything said about the carrier's obligations of insurance, and in particular about the compulsory insurance against third party risks." *Id.* at 50a. The question presented here, however, is whether the Convention "unifies the rules" governing a subject that it *does* address: a carrier's liability to passengers for personal injury.

[7] The definition of "accident" has been "flexibly applied" in this context to include not just inadvertent harms, but reckless and even intentional torts as well, such as "torts committed by terrorists." *Saks*, 470 U.S. at 405. The term is often given a similarly expansive meaning in the context of insurance law: "In the absence of a policy provision on the subject, there is much support for the view that injury or death intentionally inflicted by a third person upon the insured is nevertheless due to accident or accidental means where it was neither foreseen, expected, nor anticipated *by the insured*." Tinio, *Accident Insurance: Death or Injury Intentionally Inflicted by Another as Due to Accident or Accidental Means*, 49 A.L.R.3d 673, 678 (1973) (emphasis added; footnotes omitted). The expansive scope of the term "accident" is one answer to the court of appeals' concern (Pet. App. 20a) that carriers not escape liability for their intentional torts. See also *id.* at 64a-65a.

timate draft, all sources of carrier liability were groupcd in a single Article, which, *inter alia*, made a carrier liable "in the case of death, wounding, or any other bodily injury suffered by a traveler." *Second Int'l Conference on Private Aeronautical Law, Minutes*, Oct. 4-12, 1929, Warsaw 264-265 (Horner & Legrez trans. 1975) (*Minutes*) (quoted in *Saks*, 470 U.S. at 401). That Article was split in three, and recast into what are now Articles 17, 18, and 19, "primarily because delegates thought that liability for baggage should commence upon delivery to the carrier, whereas liability for passengers should commence when the passengers later embark upon the aircraft." *Saks*, 470 U.S. at 402.

In adding the final clause of what is now Article 17—"if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking"—the delegates accomplished two objectives: first, they clarified that carriers would be liable for injuries that were triggered by events occurring during (or around the time of) the flight but did not become manifest until later, see *Minutes*, *supra*, at 166-167, and, second, they ensured that carriers would be liable only for events properly characterized as "accidents," see *Saks*, 470 U.S. at 405. In securing the latter objective, the delegates sought, of course, to confine the scope of a carrier's liability under the Convention. We have found nothing in the Convention's drafting history to suggest that the delegates intended, at the same time, to *expand* the scope of a carrier's unlimited liability under local law.[8] But that would be the obvious (and very signifi-

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[8] As observed in note 1 above, many international carriers voluntarily agreed in 1996 to waive the treaty-based limit on exposure to compensatory (though not punitive) liability. Such private agreements do not, of course, "purport to change or clarify the provisions of Article 17," and they "do[] not and cannot purport to speak for the signatories"

cant) consequence of their drafting change if the court of appeals' interpretation of the Convention's exclusivity provision were correct. The delegates' failure to endorse that consequence—or even to acknowledge it—strongly suggests that the court of appeals' interpretation is not correct, and that the Convention's liability provisions for personal injury are exclusive.

Finally, the overall structure of the Convention is far more consistent with that conclusion than with the court of appeals' approach. One provision illustrating that point is Article 23, which invalidates "[a]ny provision [in a travel contract] tending to relieve the carrier of liability" to passengers. By its terms, that provision appears applicable to any provision relieving carriers of *any* kind of liability to which they might be subject after ratification of the Convention. But the delegates' intricate compromise between the interests of passengers and the interests of carriers, see pages 2-3, *supra*, would be defeated if the Convention were construed not only to bar a carrier from contracting out of its *limited* liability under the Convention itself, but also to perpetuate its exposure to *unlimited* liability under local law and to prevent it from contracting out of that liability as well.

That the court of appeals' approach would produce such an asymmetric result, as well as several other interpretive anomalies noted by the House of Lords in *Abnett*, see Pet. App. 53a-56a, strongly suggests that the delegates intended for Article 17 to speak comprehensively to the subject of a carrier's liability to passengers for personal

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to the Convention. *Floyd*, 499 U.S. at 549. Moreover, according to amicus Air Transport Association of America (Br. 7-8), "[t]he consensus among the airlines" necessary to reach the 1996 agreement "was achieved with the common understanding that the Warsaw Convention provided the exclusive remedy for all injuries incurred during international air transportation."

injuries arising within the Convention's scope. As the House of Lords concluded, those delegates did not intend for the courts of the various signatories to "set[] alongside the Convention * * * an entirely different set of rules which would distort the operation of the whole scheme." *Id.* at 65a. That view of the House of Lords, as the final legal position of a sister signatory, is "entitled to considerable weight." *Saks*, 470 U.S. at 404.

2. The Court should limit its review to the first question presented in the certiorari petition. Respondent alleged, in addition to her personal injury claim, a claim for lost baggage. See Pet. App. 5a. While in Israel, she called petitioner's Tel Aviv office to inquire about her missing items. *Ibid.* Respondent testified that one of petitioner's agents informed her that she must take care of the matter in New York, and that petitioner was "not interested in [her] missing items." *Ibid.* When respondent returned from her trip—39 days after her flight—she provided written notice to petitioner's New York office of her missing baggage. *Id.* at 30a.

Article 18 of the Convention makes a carrier liable for baggage that is lost or damaged during international air transportation. Article 26, however, requires claimants to give the carrier written notice of any baggage damage within three days of the date of receipt. Under Article 26(4), "[f]ailing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part." The district court, following circuit precedent, explained that the fraud exception to the notice requirement "'is not of a restrictive nature,' but includes 'any intentional acts by the carrier or its agents which significantly decrease the likelihood of the shipper's giving notice during the brief period allowed.'" Pet. App. 31a (quoting *Denby* v. *Seaboard World Airlines*, 737 F.2d 172, 183 (2d Cir. 1984)). The district court held that respondent had satisfied the fraud standard and that she was therefore

not barred by the notice requirement from pursuing her claim for damaged baggage. *Ibid.* It then awarded her $1034.90 in damages. *Id.* at 32a-33a. Without analysis, the court of appeals rejected petitioner's cross-appeal challenging that award. *Id.* at 23a.

Petitioner argues that respondent's "trial testimony failed to meet the fraud standard required by Article 26(4)." Pet. 19. Petitioner does not argue, however, that the court of appeals' previously articulated construction of the fraud standard conflicts with the decision of any other court, nor does petitioner identify any other reason why that issue warrants this Court's review. This Court should therefore deny review of the second question presented in the petition.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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APRIL 1998

Supreme Court, U.S.
FILED
JUL 16 1998
CLERK

No. 97-475

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

—v.—

TSUI YUAN TSENG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1997
CERTIORARI GRANTED MAY 18, 1998

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 94-CV-3385

TSUI YUAN TSENG,

Plaintiff,

—v.—

EL AL ISRAEL AIRLINES, LTD.,

Defendant.

DOCUMENT DATE	DOCKET NUMBER	DESCRIPTION
05/09/94	1	NOTICE OF REMOVAL from N.Y. Sup. State Court County of New York; FILING FEE $120 RECEIPT # 215291 (sc) [Entry date 05/10/94]
05/09/94	3	ANSWER to Complaint by El Al Israel Airlin. (Attorney S. Forsyth); Firm of: Condon & Forsyth by attorney Stephen J. Fearson for defendant El Al Israel Airlin. (sc) [Entry date 05/10/94]
09/14/94	5	STIPULATION and ORDER, that for the purposes of this action only, the individuals who conducted preboarding

DOCUMENT DATE	DOCKET NUMBER	DESCRIPTION
		security and searches at John F. Kennedy International Airport 22 May 1993 are to be deemed employees or agents of defendant El Al Israel Airlines, Ltd. (signed by Judge Louis L. Stanton). (jr) [Entry date 09/15/94]
01/05/95	7	NOTICE OF MOTION by Tsui Yuan Tseng to compel deft. to produce the security manual containing the procedures employed by it in respect to pltff. upon the continued deposition of deft., to respond to pltff's questions propounded at the deposition of deft. by Gideon Meiry on 9/13/94, for appropriate sanctions be imposed in accordance with rule 37. Affdvt. of Robert H. Silk attached to motion, Return date 1/10/95 (ls) [Entry date 01/09/95]
01/05/94	8	AFFIDAVIT in opposition to Gideon by El Al Israel Airlin. Re: [7-1] motion to compel deft. to produce the security manual containing the procedures employed by it in respect to pltff. upon the continued deposition of deft., to respond to pltff's questions propounded at the deposition of deft. by Gideon Meiry on 9/13/94, [7-2] motion for appropriate sanctions be imposed in accordance with rule 37, and IN SUPPORT OF EL AL's motion for a protective order (ls) [Entry date 01/09/95]
01/05/95	9	NOTICE OF CROSS MOTION by El Al Israel Airlin. for an order protecting deft. El Al Israel Airlines, Ltd. from its highly sensitive, confidential and privi-

DOCUMENT DATE	DOCKET NUMBER	DESCRIPTION
		leged security manuals and procedures, for costs and attorney fees. Return date 1/10/95 (ls) [Entry date 01/09/95] [Edit date 01/09/95]
01/05/95	10	Reply affidavit of Dalia Carmel by El Al Israel Airlin. in support of [9-1] motion for an order protecting deft. El Al Israel Airlines, Ltd. from disclosing its highly sensitive, confidential and privileged security manuals and procedures, [9-2] motion for costs and attorney fees (ls) [Entry date 01/09/95]
01/05/95	11	AFFIDAVIT in opposition of Diane Westwood Wilson by El Al Israel Airlin. Re: [7-1] motion to compel deft. to produce the security manual containing the procedures employed by it in respect to pltff. upon the continued deposition of deft., to respond to pltff's questions propounded at the deposition of deft. by Gideon Meiry on 9/13/94, [7-2] motion for appropriate sanctions be imposed in accordance with rule 37, [10-1] support response, and IN SUPPORT OF [9-1] motion for an order protecting deft. El Al Israel Airlines, Ltd. from its highly sensitive, confidential and privileged security manuals and procedures (ls) [Entry date 01/09/95]
01/05/95	12	REPLY MEMORANDUM by Tsui Yuan Tseng (pl) [Entry date 01/10/95]
01/05/95	13	MEMORANDUM by Tsui Yuan Tseng in support of [7-1] motion to compel deft. to produce the security manual containing the procedures employed by it in

DOCUMENT DATE	DOCKET NUMBER	DESCRIPTION
		respect to pltff. upon the continued deposition of deft., to respond to pltff's questions propounded at the deposition of deft. by Gideon Meiry on 9/13/94, opposition to [9-1] for an order protecting deft. El Al Israel Airlines, Ltd. from its highly sensitive, confidential and privileged security manuals and procedures (pl) [Entry date 01/10/95]
01/05/95	14	MEMORANDUM of Points and Authorities of by El Al Israel Airlin. in opposition to [7-1] motion to compel deft. to produce the security manual containing the procedures employed by it in respect to pltff. upon the continued deposition of deft., to respond pltff's questions propounded at the deposition of deft. by Gideon Meiry on 9/13/94, support of [9-1] for an order protecting El Al Israel Airlines, Ltd. from its highly sensitive, confidential and privileged security manuals and procedures (pl) [Entry date 01/10/95]
01/05/95	15	REPLY MEMORANDUM of Points and Authorities of by El Al Israel Airlin. re: in further support [9-1] for an order protecting deft. El Al Israel Airlines, Ltd. from its highly sensitive, confidential and privileged security manuals and procedures (pl) [Entry date 01/10/95]
02/08/95	16	AFFIDAVIT in further support of D. Carmel by El Al Israel Airlin. Re: [9-1] for an order protecting deft. El Al Israel Airlines, Ltd. from its highly sensitive,

DOCUMENT DATE	DOCKET NUMBER	DESCRIPTION
		confidential and privileged security manuals and procedures (cd)
09/19/95	--	Memo endorsed on motion; DENYING [7-1] motion to compel deft. to produce its security manual or testimony concerning its contents, or both. El Al's motion for an order protecting is from disclosure of its security manuals on procedures is granted . . . A conference will be held in room 21C of the courthouse, 500 Pearl Street, New York, New York, on Friday, 9/29/95 at 5:00 p.m., to set times for the completion of any further discovery and the filing of a pretrial order. (signed by Judge Louis L. Stanton) (ae) [Entry date 09/25/95]
09/25/95	--	Memo endorsed on motion; granting [9-1] for an order protecting deft. El Al Israel Airlines, Ltd. from its highly sensitive, confidential and privileged security manuals and procedures. Plaintiff's motion to compel defendant El Al to produce its security manual or testimony concerning its contents, or both, is denied . . . (signed by Judge Louis L. Stanton) (ae) [Entry date 09/29/95]
01/12/96	18	PLTFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (kk) [Entry date 01/17/96]
01/12/96	19	PLTFF'S TRIAL BRIEF . . . (kk) [Entry date 01/17/96]
01/12/96	21	DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW (ae) [Entry date 01/18/96]

DOCUMENT DATE	DOCKET NUMBER	DESCRIPTION
01/12/96	22	TRIAL BRIEF of El Al Israel Airlin. (ae) [Entry date 01/18/96]
03/14/96	24	ORDER, Because the Warsaw Convention precludes recovery for emotional injury or for the physcial manifestations of such injury, plaintiffs' claims seeking such recovery are dismissed. For her claims of damage to and loss of items in her baggage, plaintiff is entitled to damages in the amount of $1034.90, plus prejudgment interest according to law. The Clerk is directed to enter judgment accordingly (signed by Judge Louis L. Stanton); Copies mailed (To J.C. on 3/15/96) (pl) [Entry date 03/15/96]
03/15/96	25	DEFENDANT'S BRIEF establishing that there is no right of recovery for alleged emotional distress absent bodily injury under the warsaw convention. (ae) [Entry date 03/18/96]
03/20/96	28	JUDGMENT # 96,0591, ... ORDERED, ADJUDGED AND DECREED: that the pltff have judgment in the sum of $1,034.90 with pre-judgment interest from 5/22/93 through 3/20/96 at 9% equaling $263.60; all totaling the judgment sum of $1,298.50 as against the deft. EOD: 3/20/96 (SO ORDERED CLERK, JAMES M. PARKISON); Mailed copies and notice of right to appeal (kg)
04/17/96	29	NOTICE OF APPEAL by Tsui Yuan Tseng; from [28-1] judgment order. Copies of notice of appeal mailed to Attorney(s) of Record: Condon & Forsyth (em)

DOCUMENT DATE	DOCKET NUMBER	DESCRIPTION
04/30/96	34	NOTICE OF CROSS-APPEAL by El Al Israel Airlin. from judgment entered on March 20, 1996. Copies sent to Silk, Bunks & Suckle, P.C., fees pd. rec # 261025 (as) [Entry date 05/10/96]
05/09/96	31	Transcript of record of proceedings filed for dates of 3/7/96 before Judge Stanton. (rag)
05/09/96	32	Transcript of record of proceedings filed for dates of 3/11/96 before Judge Stanton. (rag)
05/09/96	33	Transcript of record of proceedings filed for dates of 3/8/96 before Judge Stanton. (mb)
05/20/96	35	STIPULATION and ORDER, IT IS HEREBY STIPULATED AND AGREED by and between the undersigned counsel for the above parties that the Docket Sheet herein be amended and corrected so as to include the Consent Pretrial Order which is executed by counsel of the above parties and on file herewith and that the Docket, so corrected, be transmitted to the Clerk of the United States Court of Appeals, Second Circuit, by the Clerk of the United States District Court SDNY AND IT IS FURTHER AGREED that an order effecting the foregoing may be granted and entered without further notice. Stanton.) (djc)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 96-7447L & 96-7619XAP

TSUI YUAN TSENG,

Plaintiff-Appellant-Cross-Appellee,

—v.—

EL AL ISRAEL AIRLINES, LTD.,

Defendant-Appellee-Cross-Appellant.

DOCUMENT DATE	DESCRIPTION
05/24/96	Appellant Tsui Yuan Tseng brief FILED with proof of service (cv73) [96-7447]
05/24/96	Appellant Tsui Yuan Tseng joint appendix filed w/pfs. Number of volumes: 1. (cv73) [96-7447]
07/31/96	Appellee-Cross-Appellant El Al Israel Airline in 96-7447 brief filed with proof of service. (cv73) [96-7447]
08/13/96	Appellant-Cross-Appellee Tsui Yuan Tseng in 96-7447 reply brief filed with proof of service. Satisfy appellant's reply brief due. (cv72) [96-7447]

DOCUMENT DATE	DESCRIPTION
11/20/96	Case heard before Newman, Chief Judge, Cardamone, Altimari, C.JJ. (TAPE: # 85) (unj) [96-7447]
02/06/97	Appellee-Cross-Appellant El Al Israel Airline in 96-7447 28(J) letter received. (cc: panel) (cv72) [96-7447]
02/07/97	Appellant Tseng response letter to 28j letter of Appellee received. (cc: panel) (cv72) [96-7447]
06/13/97	Judgment of the district court is AFFIRMED IN PART. REVERSED IN PART and REMANDED by published signed opinion filed. (RJC) [96-7447] (cv72) [96-7447]
07/08/97	Judgment MANDATE ISSUED. (cv72) [96-7447]
09/08/97	Letter sent to district court recalling mandate. (cv72) [96-7447]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TSUI YUAN TSENG,

Plaintiff,

—against—

EL AL ISRAEL AIRLINES, LTD.,

Defendant.

COMPLAINT

Plaintiff, complaining of the Defendant, by SILK, BUNKS & SUCKLE, P.C , her attorneys, alleges:

FIRST CAUSE OF ACTION:

1. Defendant is a corporation regularly engaged in the transaction of business in the State of New York.

2. At all times herein, defendant owned, operated, controlled, and managed an airline.

3. At all times herein, defendant carried passengers for hire on its airline between New York and Israel.

4. Prior hereto, plaintiff purchased a ticket for transportation on defendant's airline from New York to Israel.

5. The flight upon which plaintiff booked passage was scheduled to depart from JFK International Airport, in the Borough of Queens, City of New York, on May 22nd, 1993.

6. At all times herein, defendant maintained terminal facilities for departing passengers on its aircraft at JFK.

7. On May 22, 1993, plaintiff appeared at defendant's facilities at JFK International Airport to prepare for departure on the plane on which she had booked her flight.

8. Defendant then and there negligently, recklessly and forcibly took plaintiff into custody, partially stripped, examined bodily, assaulted, and falsely imprisoned and physically and mentally abused her, and subjected her to grossly humiliating treatment, all without cause, justification, or right, and caused her to sustain serious traumatic injury of a permanent nature.

9. In consequence of the foregoing, plaintiff was damaged in the sum of Five Million ($5,000,000) Dollars.

SECOND CAUSE OF ACTION:

10. In the course of the foregoing episode, defendant caused plaintiff's luggage and personal belongings to be seized, her belongings and clothing ripped through, disheveled, stained, and damaged, and valuable property to be seized, appropriated and converted, all to plaintiff's damage in the sum of Seventy Five Thousand ($75,000) Dollars.

WHEREFORE, plaintiff demands judgment against defendant in the sum of Two Million ($5,000,000) Dollars on the First Cause of Action and Seventy Five Thousand ($75,000) Dollars on the Second Cause of Action with interest thereon, with costs and disbursements.

SILK, BUNKS & SUCKLE, P.C.,
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

94 civ. 3385(LLS)

TSUI YUAN TSENG,

Plaintiff,

—against—

EL AL ISRAEL AIRLINES, LTD.,

Defendant.

ANSWER OF DEFENDANT EL AL ISRAEL AIRLINES, LTD.

Defendant EL AL ISRAEL AIRLINES, LTD., by and through its attorneys Condon & Forsyth, for its Answer to the Complaint herein, alleges upon information and belief as follows:

AS TO THE FIRST ALLEGED CAUSE OF ACTION

1. Denies the allegations in paragraphs 1, 2 and 3 of the Complaint except admits that defendant EL AL, a foreign corporation duly organized and existing under the laws of Israel, does business in the State of New York and is engaged in the international transportation of passengers and cargo for hire.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 4 and 5 of the Complaint.

3. Denies the allegations in paragraph 6 in the Complaint.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 of the Complaint.

5. Denies the allegations in paragraphs 8 and 9 of the Complaint.

AS TO THE SECOND ALLEGED CAUSE OF ACTION

6. Denies the allegations in paragraph 10 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

7. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

8. Alleges that whatever injury or damage may have been sustained by plaintiff was caused or contributed to by said plaintiff's own negligence or culpable conduct and that defendant EL AL is, therefore, not liable to plaintiff or, alternatively that its liability to plaintiff is partial only and should be reduced in accordance with applicable law.

THIRD AFFIRMATIVE DEFENSE

9. Alleges that whatever injury or damage may have been sustained by plaintiff was caused by the direct and proximate negligence of other parties, their agents or employees or by others unknown at this time over whom defendant EL AL had no control at any time relevant hereto, and in the event EL AL is found liable to plaintiff, which liability is expressly denied, defendant EL AL will be entitled to indemnification, contribution or apportionment of liability pursuant to applicable law.

FOURTH AFFIRMATIVE DEFENSE

10. Any alleged detention of plaintiff and/or any alleged use of physical force was lawful, reasonable, privileged, authorized and justified.

FIFTH AFFIRMATIVE DEFENSE

11. Alleges that pursuant to its Tariffs on file with the Department of Transportation of the United States and pursuant to its conditions of carriage set forth in the relevant contract of transportation, defendant EL AL is not liable to plaintiff or, in the alternative, defendant EL AL's liability is limited.

SIXTH AFFIRMATIVE DEFENSE

12. Plaintiff's claims against EL AL are barred by the Act of State Doctrine.

WHEREFORE, defendant EL AL ISRAEL AIRLINES, LTD. demands judgment dismissing the Complaint in its entirety or, alternatively, judgment limiting its liability pursuant to the foregoing, and all other relief which to this Court may seem just and proper in the circumstances.

CONDON & FORSYTH

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To: SILK, BUNKS & SUCKLE, P.C.
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. 94 Civ. 3385 (LLS)
Filed September 14, 1994

TSUI YUAN TSENG,

Plaintiff,

—against—

EL AL ISRAEL AIRLINES, LTD.,

Defendant.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned counsel for the above parties that, for the purposes of this action only, the individuals who conducted preboarding security and searches at John F. Kennedy International Airport 22 May 1993 are to be deemed employees or agents of defendant EL AL ISRAEL AIRLINES, LTD.

SILK, BUNKS & SUCKLE, P.C.

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Attorneys for Defendant
EL AL ISRAEL AIRLINES, LTD.

Dated: September 14, 1994

SO ORDERED:

LOUIS L. STANTON
Louis L. Stanton, U.S.D.J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

94 Civ. 3385 (LLS)

TSUI YUAN TSENG,

Plaintiff,

—against—

EL AL ISRAEL AIRLINES, LTD.,

Defendant.

CONSENT PRETRIAL ORDER

The parties, having exchanged proposed findings and counter-findings of fact in accordance with the pre-trial procedures of United States District Judge Louis L. Stanton, hereby submit the following:

A. AGREED FINDINGS OF FACT

1. Defendant is a foreign corporation organized under the laws of Israel and engaged in business in the State of New York.

2. At all times herein, defendant was engaged in the international air transport of passengers and cargo on an airline known as EL AL ISRAEL AIRLINES on flights from New York City to Tel Aviv.

3. Prior to May 22, 1993, plaintiff purchased a ticket for air transportation on defendant's airline from New York to Israel.

4. The flight upon which plaintiff booked passage was Flight LY-008 which was scheduled to depart from JFK International Airport, in the Borough of Queens, City of New York, on May 22, 1993.

5. At all items herein, defendant maintained and operated terminal facilities for departing passengers on its aircraft at JFK International Airport.

6. On May 22, 1993, plaintiff appeared at defendant's facilities at JFK International Airport to prepare for departure on the plane on which she had booked her flight.

7. Gideon Meiry was EL AL regional security manager for the United States in May 1993.

8. Gideon Meiry's employment duties consisted of training, hiring and managing the security staff and being responsible for implementation of security procedures in all EL AL's activities.

9. Gideon Meiry was in charge of security procedures for defendant for passengers prior to their boarding EL AL planes at JFK International Airport on May 22, 1993, and was actually engaged at JFK in the performance of such duty on that day.

10. Gideon Meiry does not have a log or record listing the employees on duty at that time.

11. Plaintiff is a woman of oriental appearance.

12. Gideon Meiry does not recall plaintiff at this time.

13. Plaintiff's name is contained on records kept by defendant marked as defendant's exhibits 1, 2, 3, 4 and 5 to the deposition of Gideon Meiry held September 13, 1994.

14. Defendant has no records of to whom on the security crew plaintiff spoke.

15. Plaintiff had presented to defendant her American passport.

16. For the purposes of this action only, the individuals who conducted pre-boarding security and searches at JFK International Airport on May 22, 1993 are deemed employees or agents of defendant EL AL.

17. Gideon Meiry does not recall any of the interview.

18. Gideon Meiry does not recall what the illogical story was.

19. Gideon Meiry does not know who conducted the search of plaintiff, and has no records which shed light on the identity of such person.

B. PLAINTIFF'S PROPOSED FINDINGS OF FACT

1. Defendant then and there forcibly took plaintiff into custody, partially stripped, examined bodily, assaulted, and falsely imprisoned and physically and mentally abused her, and subjected her to grossly humiliating treatment, all without cause, justification, or right, and caused her to sustain serious traumatic injury of a permanent nature. (Testimony of plaintiff and Drs. Anthony J. Sarro and James M. McGowan).

2. In the course of the foregoing episode, defendant caused plaintiff's luggage and personal belongings to be seized, her belongings and clothing ripped through, disheveled, stained, and damaged, and valuable property to be seized, appropriated and converted, all to her damage. (Testimony of plaintiff, supplementing facts agreed to above; Chen-Nang Tai, 306 W. 93rd St., Apt. 46, New York City, concerning his gift to plaintiff of Rolex watch and value thereof prior to the flight).

3. Gideon Meiry identified the exhibits 1, 2, 3, 4 and 5 marked at his deposition as containing plaintiff's name on a list of high risk passengers on that particular flight.

4. Gideon Meiry testified that it was a routine procedure to put everybody's name on a high risk passenger list but the only name on the list was plaintiff's.

5. Gideon Meiry instructed one of his employees, a Mr. Magid, to place plaintiff's name on the list. Mr. Meiry claims that he considered plaintiff a high risk passenger on the basis of what he says was an illogical story, but does not remember the story which he says was illogical.

6. Gideon Meiry says that plaintiff did not speak to him but to one of his employees and he does not know to which one.

7. At all relevant times, Ms. Tseng had been issued by defendant and possessed a boarding pass for EL AL Flight LY-008 and was on the defendant's passenger list for that flight.

8. Plaintiff's name was listed not on any documents that Mr. Meiry had in his possession from any source as a person who would be a risky person for EL AL to take on board a flight.

9. Defendant conducted a pre-boarding search of plaintiff's person and property at the EL AL Terminal at JFK International Airport on May 22, 1993.

10. Gideon Meiry assumes he was present for at least part of a pre-boarding security interview of plaintiff.

11. Gideon Meiry denies being present during the search of plaintiff's person.

12. Gideon Meiry recalls plaintiff being escorted to a special room for a search to be conducted.

13. Defendant's stated basis for declaring plaintiff a security risk in the first place was an allegedly illogical story which she allegedly told.

14. Plaintiff was eventually cleared and allowed by defendant to board Flight LY-008 though the search did not clear up plaintiff's alleged illogical story.

15. No one in Gideon Meiry's division is in the position to clarify what the story he deemed illogical was besides Mr. Meiry, and he cannot do it.

16. Plaintiff's luggage was searched in a different room from where her body was searched.

C. DEFENDANT'S PROPOSED COUNTER-FINDINGS OF ULTIMATE FACT

1. In accordance with defendant's pre-boarding procedures, plaintiff was questioned about her destination and travel plans. EL AL's records show that, based upon plaintiff's responses, she matched the characteristics of a "high risk" passenger. Affidavit of Gideon Meiry, EL AL Regional Security Manager, sworn to December 7, 1994, submitted in support of EL AL's motion for a protective order ("Meiry Aff.") ¶ 6; Meiry Dep. Ex. "1."

2. Plaintiff voluntarily followed defendant's employee to a room within the boarding area to be questioned. Defendant's employees did not at any time use force to question or search plaintiff. Tseng Dep. at 23.

3. Plaintiff's baggage was searched and plaintiff, while fully clothed, also was searched. Meiry Aff. ¶ 6; Tseng Dep. at 57-58.

4. Plaintiff voiced no objection to the search. Meiry Aff. ¶ 7; Tseng Dep. at 24, 30.

5. Defendant did not at any time request plaintiff to remove her underclothing, her jeans, her t-shirt or her socks. Tseng Dep. at 58.

6. The search of plaintiff and her baggage was conducted in accordance with EL AL's security manuals and procedures which are approved in accordance with U.S. Federal Regulations. Meiry Aff. ¶ 8.

D. DEFENDANT'S PROPOSED FINDINGS ON AFFIRMATIVE DEFENSES AND OTHER SUBJECT MATTER

1. Plaintiff's passenger ticket provided for "international transportation" within the meaning of Article 1(2) of the Warsaw Convention. The places of departure and destination, the United States, is a High Contracting Party to the Warsaw Convention and there was an agreed stopping place in another country, Israel.

2. It is standard EL AL practice to admit only ticketed passengers into the EL AL Terminal.

3. Plaintiff was not free to leave the area where she was interviewed unless she declined to board EL AL flight 008.

4. The questioning of a would-be passenger for security purposes is a usual event in the course of international air transportation.

5. All passengers intending to travel by air transportation are subject to security procedures.

6. EL AL is one of the only airlines which subjects baggage and cargo to a pressurization test prior to being loaded onto the aircraft.

7. The pre-boarding questioning and search of plaintif was a justified security measure.

8. Plaintiff was searched because she fit a "high risk" passenger profile, i.e., she fit the profile of a passenger who may present a danger to the flight security of EL AL.

9. Once plaintiff and her belongings were searched, EL AL security concluded that plaintiff was not an immediate threat to the safety of EL AL flight 008, and she was permitted to board the aircraft.

10. Plaintiff was never physically harmed in any manner by defendant. Rather, plaintiff is seeking damages essentially for

the emotional distress which she allegedly underwent as a result of the pre-boarding search.

11. Plaintiff allegedly discovered that items were missing from her carry-on baggage upon arrival in Tel Aviv on May 23, 1993.

12. EL AL Tariff Rule No. 55 (E)(1) requires that complaints for damage to baggage be made in writing within seven days from the date of receipt of such baggage.

13. EL AL Tariff Rule No. 55 (E)(1) requires that complaints for loss of baggage be made in writing within twenty-one days from the date the baggage should have been returned to the passenger.

14. Plaintiff did not make a written or oral complaint to defendant about the alleged items missing from her baggage while she was in Tel Aviv.

15. Plaintiff returned to the United States on June 26, 1993.

16. Plaintiff provided defendant with her first written notice of claim on July 1, 1993, thirty-nine days after plaintiff's arrival in Tel Aviv.

17. Plaintiff has not made any insurance claims on the items allegedly missing from her baggage.

18. EL AL Tariff Rule No. 115 (Q) sets the maximum weight permitted for checked baggage on defendant's flights at no more than seventy pounds (32 kilograms).

19. EL AL Tariff Rule No. 55 (C)(7) limits defendant's liability, if any, to a maximum of $20.00 per kilogram ($9.07 per pound) for checked baggage and $400.00 for unchecked baggage.

20. Plaintiff alleges that certain items from her checked baggage were missing and other items were damaged.

21. The actions taken by defendant were neither outrageous nor extreme.

22. Defendant never put plaintiff in a position which unreasonably endangered her physical safety nor where she could fear for her own physical safety.

23. Defendant did not in any way place plaintiff in fear of an imminent harmful or offensive contact.

24. Defendant did not convert the items allegedly missing from plaintiff's checked baggage.

E. EXPERT WITNESSES

Plaintiff intends to call upon the following physicians as expert witnesses to testify:

Dr. Anthony J. Sarro
Dr. James M. McGowan

Defendant intends to call upon Mr. Joseph Sullivan as an expert witness to testify with respect to airport security procedures on behalf of EL AL.

F. PREMARKED JOINT TRIAL EXHIBITS

The parties hereby stipulate and agree that the following exhibits may be received, with the Court's approval, in evidence at trial as premarked joint trial exhibits:

1. Stipulation by defendant, or faxed copy of same, to defendant's employment of individuals who conducted pre-boarding security search at JFK International Airport on May 22, 1993.

2. Plaintiff's passenger ticket on EL AL flight No. LY-008 from New York, JFK to Tel Aviv.

3. Affidavit of Gideon Meiry, EL AL Regional Security Manager, sworn to December 7, 1994, submitted in support of EL AL's motion for a protective order.

4. Letter from plaintiff to EL AL, attention I. Mittleman dated July 1, 1993.

5. Meiry Dep. Exhibits "1", "2", "3", "4" and "5."

6. Copy of plaintiff's boarding pass issued to plaintiff on May 22, 1993, plaintiff's passenger receipt for ticket no. 114 151 0552 429, EL AL baggage tag for flight EL AL 008 and two (2) Alitalia baggage tags for flight AZ 610.

7. Copy of EL AL receipt for camera.

G. PREMARKED DISPUTED EXHIBITS

The parties have not been able to agree on the admissibility of the following premarked exhibits which they intend to offer at trial:

PLAINTIFF'S EXHIBIT 1. Copy of passenger receipt for Soro for flight EL AL 0845 Tel Aviv/Rome.

PLAINTIFF'S EXHIBIT 2. Copy of letter from The Port Authority of New York and New Jersey to plaintiff dated March 12, 1994.

DEFENDANT'S EXHIBIT A. Certified copy of EL AL International Passenger Rules and Fares Tariff ("EL AL Tariff Rule"), NTA (A) No. 324, ¶C.A.B. NO. 530, Rule Nos. 55 (C) (7), (8) Limitation of Liability, and (E)(1), Time Limitations on Claims and Actions.

DEFENDANT'S EXHIBIT B. Certified copy of EL AL Tariff Rule No. 115(Q), Free Baggage Allowance and Excess Baggage Charges.

DEFENDANT'S EXHIBIT C. Airplane and Airport Operator Security Rules, 46 Fed. Reg. 3782, 3783 (1981).

DEFENDANT'S EXHIBIT D. 14 C.F.R. § 108 (1995).

DEFENDANT'S EXHIBIT E. 14 C.F.R. § 129.25 (1995).

DEFENDANT'S EXHIBIT F. 14 C.F.R. § 107 (1995).

H. TYPE OF TRIAL AND ESTIMATED LENGTH

1. This will be a non-jury trial.

2. Plaintiff estimates that it will take two days to present her case.

3. Defendant estimates that it will take one day to present its case.

SILK, BURNS & SUCKLE, P.C.

BY ROBERT H. SILK
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CONDON & FORSYTH

BY DIANE WESTWOOD WILSON
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DW 0520
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(212)757-6870
Attorneys for Defendant

SO ORDERED,

Dated: New York, New York
January ___, 1996

_____
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

94 Civ. 3385 (LLS)

TSUI YUAN TSENG,

Plaintiff,

—against—

EL AL ISRAEL AIRLINES, LTD.,

Defendant.

MEMORANDUM AND ORDER

Plaintiff Tsui Yuan Tseng claims defendant El Al Israel Airlines, Ltd. ("El Al"), which searched her person and bags as she was boarding a flight, subjected her to assault, false imprisonment, physical and mental abuse and humiliation, and the loss of and damage to her property.

The case was tried to the court on March 7, 8, and 11, 1996. From my observation of the witnesses and exhibits, I find the preponderance of the credible evidence establishes the following facts. All Agreed Findings in the Consent Pretrial Order are found as facts, and are supplemented by the findings below.

FACTS

On May 22, 1993, Ms. Tseng went to El Al's terminal at John F. Kennedy International Airport in Queens, New York to take a flight to Tel Aviv. While awaiting check-in she was queried about her reasons for the trip, asked to wait, and then

taken to a small room with a few chairs and a table, where she was searched.

At the instruction of a uniformed man and woman, she put her luggage (a suitcase, a carry-on bag and her purse) on the table and unlocked it. The man and woman took out the contents of her luggage and put her things into small baskets, which they took into another room into which she was not allowed to follow.

The woman then told Ms. Tseng to take off her jacket, sweater, shoes, and belt, and to loosen and lower her blue jeans to just below her hip. The woman proceeded to search her, first by feeling her body by hand outside her clothes from head to toe, and then with an electronic security wand.

After an hour or so, they stuffed her things messily back into her luggage. She was then escorted to her plane. They told her to leave her suitcase there, and that it would be put on the plane.

During the flight, she felt sick, upset, and nervous, and had a headache. She glanced a few times in her carry-on bag, but its contents were so disorganized that she could not find anything.

At her hotel in Tel Aviv, she opened her suitcase, carry-on bag, and purse. She sorted through the messy contents and discovered that many of her clothes were stained and damaged, and that several items were missing, including a Rolex watch, a jade ring, some of her clothes, and a thousand dollars in cash. She called El Al's office in Tel Aviv, and was told that they could not do anything about the losses in Israel and to wait until she was back in the United States and then report them.

She returned to the United States on or about June 20, 1994. Around the end of June, she went to see her doctor for treatment of headaches, upset stomach, ringing in her ears, nervousness and sleeplessness, all of which had bothered her since she was searched. She also brought to El Al, in person, a letter dated July 1, 1994, complaining about her search and detention and listing the items that were missing and damaged.

El Al claims she was searched because her reasons for her trip appeared "illogical," but it is unable (for lack of memory and records) to specify how. It urges, and I accept, that the actual method of search of her person conformed to their usual practice.

DISCUSSION

A. BODILY INJURY

The parties dispute whether the Warsaw Convention applies to plaintiff's claims that she suffered injury as a result of her detention and search by El Al. In particular, they dispute whether her claimed injuries resulted from an "accident" within the meaning of Article 17 of the Convention, which states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Air France v. Saks, 470 U.S. 392, 105 S. Ct. 1338 (1985), dealt with the definition of "accident" in Article 17. The Supreme Court concluded that "liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger," and stated further that "This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." 470 U.S. at 405, 105 S. Ct. at 1345. In *Shen v. Japan Airlines*, 1994 WL 167989 (S.D.N.Y.), *aff'd*, 43 F.3d 1459 (2d Cir. 1994), this court applied the Warsaw Convention to the detention, search, and confinement of passengers by Japan Airlines. *Id.* at *2.

Plaintiff argues that El Al's actions were not an "accident" but wilful misconduct, and therefore not covered by the Convention.

The record in this case does not support the proposition that the search of the plaintiff was wilful misconduct. The actual techniques for carrying out the search were those prescribed by El Al's procedures, and are reasonable in light of the need for discovering small dangerous objects, if the prospective passenger appears to pose a threat.

There is no evidence that the plaintiff actually posed such a threat, and there is no evidence explaining why she was selected to be searched. Although El Al's records state that her story was illogical, no reason is given why El Al personnel thought so.

It may have been a mistake. There may have appeared a basis for El Al's suspicions, although they ultimately proved groundless. However, there is no evidence and no basis for inferring that it was anything more than a mistake. Even if such a mistake can be characterized as misconduct, there is no basis for inferring that it was wilful. Accordingly, I find that it was not such wilful misconduct as might take the case outside the Convention's limitations of liability under Article 25.[1]

Occasional personal searches are recognized incidents of international air travel. The evidence shows that they occur two to four times a day at El Al alone, which averages over 1,000 times per year for that single airline.

Using the flexible application prescribed by the Supreme Court, such a routine search, applied erroneously to plaintiff in the course of embarking on the aircraft, is fairly accurately

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[1] The Convention, in Article 25(1), provides:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

characterized as an accident; that is to say, an unexpected or unusual event or happening external to the passenger.

Accordingly, the Warsaw Convention applies.

Under the Convention, the case is governed by *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 111 S. Ct. 1489 (1991), in which the Supreme Court squarely considered and squarely disallowed any recovery for psychic or psychosomatic injury unaccompanied by bodily injury. 499 U.S. at 552, 111 S. Ct. at 1502.

Here, the plaintiff sustained no bodily injury. Her body was not injured by the woman who searched her by feeling the surface of her body outside her clothing with her hands, and by using an electronic security wand to detect metal objects. On the contrary, all of her personal injuries are attributable to her shock and outrage at the way she was treated. Although her injuries may have had physical manifestations, those are the types of psychic or psychosomatic injuries barred by *Floyd* and not the "bodily injury" for which compensation is available under Article 17 of the Convention.

The Convention precludes recovery on such claims under state law. Article 24 of the Convention provides:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply . . . .

See In re Air Disaster at Lockerbie, Scotland, 928 F.2d 1267 (2d Cir.) ("the Warsaw Convention preempts state law causes of action arising under it"), *cert. denied*, 502 U.S. 920, 112 S. Ct. 331 (1991).

Accordingly, Ms. Tseng's claims for personal injuries are dismissed.

B. BAGGAGE

The Convention also applies to plaintiff's claims for damages to her checked and carry-on luggage.

"With respect to checked baggage, Article 18 provides for the strict liability of carriers for loss or damage sustained while under the control of the carrier." *Republic National Bank of New York v. Eastern Airlines, Inc.*, 815 F.2d 232, 236 (2d Cir. 1987). Ms. Tseng's suitcase was under El Al's control when the items in her suitcase were lost and damaged, so El Al is liable for that damage and loss.

For claims of damage to carry-on baggage, the Convention imposes liability on the carrier if the damage is the result of an accident. *See Baker v. Lansdell Protective Agency, Inc.*, 590 F. Supp. 165, 167 (S.D.N.Y. 1984). The items in Ms. Tseng's carry-on baggage were lost and damaged as the result of the search, which was an accident, so El Al is liable for the damage to and loss of items in that carry-on baggage.

1. Notice

The parties dispute whether El Al escapes liability for the loss of and damage to items in plaintiff's baggage under the Convention's requirement that plaintiff give prompt notice to it of the loss.

Article 26 of the Convention provides, in pertinent part:

> (2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. . . .
>
> (3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

Although Article 26 of the Convention on its face requires written notice to the carrier only when there is "damage" to

baggage, notice is also required when items in baggage are lost, because "delivery of a package or container with part of its contents missing is damage and requires notice." *Denby v. Seaboard World Airlines, Inc.*, 575 F. Supp. 1134, 1141 (E.D.N.Y. 1983), *rev'd on other grounds*, 737 F.2d 172 (2d Cir. 1984).

At the time of plaintiff's flight, El Al had extended the time for passengers to give written notice to the carrier from three days, as provided above in Article 26 of the Convention, to seven days, as provided by Rule 55(E)(1) of El Al's tariff, which provides in pertinent part:

> No action shall lie in the case of damage to baggage unless the person entitled to delivery complains to an office of carrier forthwith after the discovery of the damage, and at the latest, within seven (7) days from the date of receipt . . . .

That tariff was approved by the Civil Aeronautics Board, *see* International Passenger Rules and Fares Tariff, NTA (A) No. 324, ¶C.A.B. No. 530, Rule 55(E), and governs here. *See Tishman & Lipp, Inc. v. Delta Air Lines*, 413 F.2d 1401, 1403 (2d Cir. 1969) ("Tariffs filed with the Civil Aeronautics Board if valid, are conclusive and exclusive, and the rights and liabilities between airlines and their passengers are governed thereby").

Ms. Tseng submitted to El Al written notice of her damage in a letter dated July 1, 1993, which was 39 days after her flight to Tel Aviv. There is no evidence that she submitted written notice of the damage to El Al during the seven days after her flight.

Article 26(4) of the Convention provides

> Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Accordingly, Ms. Tseng's claims for damage to her baggage are barred by the notice requirement of Article 26, unless there is "fraud" on the part of El Al.

In *Denby v. Seaboard World Airlines, Inc.*, 737 F.2d 172 (2d Cir. 1984), the Second Circuit stated that the fraud exception " 'is not of a restrictive nature,' " but includes "any intentional acts by the carrier or its agents which significantly decrease the likelihood of the shipper's giving notice during the brief period allowed." 737 F.2d at 183 (quoting N. Matte, Treatise on Air-Aeronautical Law 425 (1981)).

Ms. Tseng, after discovering at her hotel that items in her baggage were damaged and missing, promptly made a telephone call to El Al. An agent of El Al told her that they could not do anything about it and that she should talk to them back in the United States. That statement by El Al "significantly decreased the likelihood" that she would give written notice of her damage to El Al during the brief period allowed. Accordingly, the fraud exception to the notice requirement applies in this case, and the notice requirement does not bar her claim for damage to her baggage.

2. Liability Limitations

Article 22(1) of the Convention limits the liability of a carrier for checked baggage "to a sum of 250 francs per kilogram", unless the passenger has made "a special declaration of value" of the baggage at the time it was delivered to the air carrier and "has paid a supplementary sum if the case so requires." By Order of the Civil Aeronautics Board this limit of liability has been converted to $20.00 per kilogram, or $9.07 per pound. *See* C.A.B. Order 74-1-16, 39 Fed. Reg. 1526 (1974).

There has been no evidence showing how much Ms. Tseng's suitcase weighed. Where the weight of a passenger's baggage is not noted on the baggage check, the weight may be based on the maximum allowable weight as set forth in the airline's tariff. *Republic National Bank v. Eastern Airlines*, 639

F. Supp. 1410, 1411 (S.D.N.Y. 1986), *aff'd*, 815 F.2d 232 (2d Cir. 1987).

At the time of Ms. Tseng's flight, Rule 115(Q) of El Al's tariff provided:

> (1) No article will be accepted for transportation if it exceeds the following maximum quantity/size/weight:
>
> (a) If the maximum outside linear dimensions exceed 80 inches or if the article weighs more than 70 pounds (32 kilograms).

That tariff was approved by the Civil Aeronautics Board. *See* International Passenger Rules and Fares Tariff, NTA (A) No. 324, ¶ C.A.B. No. 530, Rule 115(Q). Because the maximum weight of any article of baggage that Ms. Tseng could have checked with El Al is 70 pounds, El Al's liability for her checked suitcase is limited to $9.07 per pound times 70 pounds, which is $634.90.

The Convention, in Article 22(3), also limits El Al's liability for "objects of which the passenger takes charge himself"—that is, unchecked or carry-on luggage—to "a sum of 5,000 francs per passenger." Because the Civil Aeronautics Board has converted 250 francs to 20 dollars, *see* C.A.B. Order 74-1-16, 39 Fed. Reg. 1526 (1974), 5,000 francs is converted to 400 dollars.

Therefore, the Convention limits[2] El Al's liability for the damage sustained to the plaintiff's baggage to $634.90 for her checked baggage and $400.00 for her unchecked baggage. The evidence shows that the monetary value of the damage to and loss of items in her checked and unchecked baggage,

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[2] The evidence does not establish that the loss of and damage to the items in plaintiff's luggage constituted such willful misconduct as might take the case outside the Convention's limitations of liability under Article 25. *See Chukwuma v. Groupe Air France, Inc.*, 767 F. Supp. 43, 48 (S.D.N.Y. 1991) (to presume willful misconduct "solely on the basis of the fact that some of his luggage was lost or stolen" is "a presumption that would severely undercut Article 22's limitation of liability"), *aff'd*, 962 F.2d 2 (2d Cir. 1992).

respectively, exceeded those amounts. Accordingly, plaintiff is entitled to recover for the damage to her baggage in the amount of $1034.90.

CONCLUSION

Because the Warsaw Convention precludes recovery for emotional injury or for the physical manifestations of such injury, plaintiff's claims seeking such recovery are dismissed.

For her claims of damage to and loss of items in her baggage, plaintiff is entitled to damages in the amount of $1034.90, plus prejudgment interest according to law.

The Clerk is directed to enter judgment accordingly. So ordered.

Dated: New York, New York
March 13, 1996

LOUIS L. STANTON

LOUIS L. STANTON
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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94 CIVIL 3385 (LLS)
Filed March 20, 1996

TSUI YUAN TSENG,

Plaintiff,

—against—

EL AL ISRAEL AIRLINES, LTD.,

Defendant.

JUDGMENT

A non-jury trial before the Honorable Louis L. Stanton, United States District Judge, having begun on March 7, 1996, and at the conclusion of the trial the Court having reserved its decision, and thereafter on March 13, 1996 the Court having rendered its Memorandum and Order finding in favor of the Plaintiff on her claims of damage to and loss of items in her baggage in the sum of $1,034.90, with pre-judgment interest, as against Defendant, and dismissing her claims for emotional injury or for the physical manifestations of such injury, it is,

ORDERED, ADJUGED AND DECREED: That the Plaintiff have judgment in the sum of $1,034.90 with pre-judgment interest from May 22, 1993 through March 20, 1996 at nine percent (9%) equaling $263.60; all totaling the judgment sum of $1,298.50 as against the Defendant.

Dated: New York, New York
March 20, 1996

JAMES M. PARKISON
Clerk of Court

By: JOHN S. HAGEN
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 3-20-96.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 331, 857—August Term, 1996

(Argued November 20, 1996 Decided June 13, 1997)

Docket Nos. 96-7447, 96-7619

TSUI YUAN TSENG,

Plaintiff-Appellant-Cross-Appellee,

—v.—

EL AL ISRAEL AIRLINES, LTD.,

Defendant-Appellee-Cross-Appellant.

Before:

NEWMAN, *Chief Judge,*
CARDAMONE and ALTIMARI, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Southern District of New York (Stanton, J.), following a bench trial, finding in favor of plaintiff on her claim of property damage and awarding

her $1,034.90, but dismissing plaintiff's claims for personal injury for failure to establish an injury cognizable under Article 17 of the Warsaw Convention.

Affirmed in part, reversed in part, and remanded.

ROBERT H. SILK, New York, New York (Silk, Bunks, & Suckle, P.C., New York, New York, of counsel), *for Plaintiff-Appellant.*

DIANE WESTWOOD WILSON, New York, New York (Debra A. Shields, Condon & Forsyth, New York, New York, of counsel), *for Defendant-Appellee.*

CARDAMONE, *Circuit Judge*:

We have two issues to resolve on this appeal. One relates to the meaning of the term "accident" under Article 17 of the Warsaw Convention. The second, and by far more elusive, is whether a plaintiff denied a remedy for alleged injuries under the Convention because it does not apply may then pursue a claim for the same injuries in state court. The Supreme Court has not answered this question, and our search for the correct answer is somewhat reminiscent of Sir Galahad's search for the "Holy Grail." But unlike that Crusader who, pressing on, left the plain and climbed the height,[1] we must toil in the

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[1] So pass I hostel, hall, and grange;
By bridge and ford, by park and pale,

valley, examining the Convention's language, its drafting history, decisional law and the thoughts of scholarly commentators.

Plaintiff Tsui Yuan Tseng (plaintiff or appellant) appeals from a judgment entered in the United States District Court for the Southern District of New York (Stanton, J.) that awarded her $1,034.90 for damages against defendant El Al Israel Airlines, Ltd. (El Al) for loss of her baggage, but dismissed her personal injury claim against the same defendant for failure to establish a cognizable injury.

Tseng alleged that El Al caused her to suffer personal injuries when it subjected her to a security search prior to her boarding an El Al flight from New York to Tel Aviv, Israel, and that the airline damaged and/or lost some of her personal belongings while searching her luggage. The district court ruled that the carrier's conduct constituted an "accident," giving rise to liability under Article 17 of the Warsaw Convention,[2] but that Tseng was barred from recovery because the only injuries she alleged were psychological and emotional, not physical.

BACKGROUND

Tseng, a New York resident employed by Beth Israel Medical Center, went on May 22, 1993 to John F.

All-arm'd I ride, whate'er betide,
Until I find the Holy Grail.

Alfred Lord Tennyson, *Sir Galahad*, *in* The Poetic and Dramatic Works of Alfred Lord Tennyson 101, 101 (W.J. Rolfe ed., Cambridge ed. Houghton, Mifflin & Co. 1898).

[2] Convention for Unification of Certain Rules Relating to International Transportation by Air, *concluded* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 40105 note.

Kennedy International Airport in New York where she was scheduled to take El Al Flight LY-008 to Tel Aviv. Upon arrival, she proceeded to El Al's terminal, presented her ticket and U.S. passport to an El Al security guard, entered the terminal building and proceeded to a security area, where she was asked routine questions regarding her destination. Based upon her responses, which the security guard considered illogical—no explanation of why they were considered so is in the record—Tseng was classified as a "high risk" passenger.

Pursuant to the airline's security procedures, plaintiff was taken to a private room where she was subjected to a security search for explosives or detonating devices. The term "security search" refers to an intrusive search of a passenger's body initiated after a routine check by metal detector and questioning have led airline personnel to deem a passenger a security risk. Tseng was told to remove her shoes, jacket and sweater, and then instructed to lower her blue jeans to mid-hip level. A female security guard proceeded to search Tseng's entire body manually, including her breasts and groin area. The search, conducted outside Tseng's clothing, lasted 15 minutes. Security guards also searched Tseng's baggage. The security search of Tseng and her baggage conformed to El Al procedures, which had been adopted pursuant to Federal Aviation Administration regulations.

Following the search, El Al decided that Tseng did not present a security risk after all and she was permitted to board her flight. Plaintiff testified that, as a result of defendant's search, she "was really sick and very upset" during the course of the flight, and "emotionally traumatized and disturbed" throughout her month-long trip to Israel and thereafter. Subsequently, she underwent medical and psychiatric treatment; but, at no time did

Tseng claim she suffered any physical injury as a result of the bodily search.

During the flight plaintiff was unable to locate several personal items she had in her carry-on bag, and, upon arriving in Tel Aviv, she was missing, among other things, $1000 in cash and a diamond Rolex watch. Tseng did not inquire about the lost items during her flight or upon landing in Tel Aviv. However, while at the Tel Aviv airport she did inquire about her camera, which had been confiscated at JFK to be X-rayed. When plaintiff arrived at her hotel, she telephoned the airline's Tel Aviv office to inquire about the camera and the other missing items. She testified that an El Al representative informed her that she must take care of the matter in New York, and that the airline was "not interested in [her] missing items." On July 1, 1993, having returned from her trip, Tseng provided written notice to El Al's New York office that several items that accompanied her to the El Al Terminal for departure on her trip were either missing or damaged.

Since she did not obtain a satisfactory response, plaintiff initiated the action giving rise to this appeal by filing a complaint in May 1994 in the New York State Supreme Court for New York County. The complaint alleged a state law personal injury claim arising from the assault and false imprisonment; it also asserted a property claim relating to her lost and/or damaged property. El Al removed the case to federal court pursuant to 28 U.S.C. § 1441(d), because El Al is a "foreign state" within the meaning of 28 U.S.C. § 1603(a), which provides that "[a] 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state."

In federal court, El Al argued that plaintiff's action was governed by the Warsaw Convention. The district court agreed, ruling it applicable because the airline's search of plaintiff constituted an "accident" within the meaning of Article 17. In applying the Convention, the trial court found the carrier liable under Article 18 for the loss and damage to Tseng's carry-on and checked baggage, and awarded her $1,034.90. The property loss award was calculated under Articles 22(2) and (3) of the Convention, which limit recovery for checked baggage to 250 francs per kilogram of baggage, and limit recovery for carry-on baggage to 5000 francs per person. These amounts have been converted to $20 per kilogram, or $9.07 per pound, for checked baggage and $400 per passenger for carry-on luggage. *See* 14 C.F.R. § 221.176(a); Warsaw Convention Liability Limitations, 39 Fed. Reg. 1526 (1974). Because the weight of Tseng's baggage could not be determined, the district court used the maximum weight allowed by El Al for checked baggage—70 pounds—to make its calculation. Tseng's personal injury claim was dismissed because she failed to show a physical injury as required by Article 17.

Plaintiff appeals the dismissal of her personal injury claim and El Al cross-appeals from the property damage award. We affirm, in part, and reverse, in part, and remand to the district court for further proceedings.

DISCUSSION

We are presented with two issues of considerable import. First, we must determine whether the security search of a passenger initially suspected of presenting a possible risk of terrorism but who is later determined not to present a danger constitutes an "accident" within the

meaning of Article 17 of the Warsaw Convention. Second, if the answer to the first question is "no," we must then determine whether the Convention provides the exclusive avenue for recovery of injuries sustained during international air travel even in cases where the terms of the Convention do not apply and it does not therefore subject the carrier to liability for damages.

Because there are a number of decisions setting forth the basic structure of the Convention—a comprehensive overview of it is set forth in *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1270-71 (2d Cir. 1991) [*Lockerbie I*]—we discuss it only insofar as necessary to the resolution of the issues before us.

I Article 17

A. *Definition of "Accident"*

Tseng maintains it was error to dismiss her personal injury claims for want of a cognizable injury. The district court ruled that a security search of a passenger based upon suspicion of circumstances that turned out not to involve any danger constitutes an accident, subjecting the carrier to liability under Article 17. Carrier liability for personal injuries sustained by passengers engaged in international air travel is governed by Article 17 of the Convention, which states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 17 applies where (1) an accident has occurred, in which (2) a passenger suffered death, wounding, or any other bodily injury, and (3) the accident occurred either on board the aircraft or in the course of embarking or disembarking from the plane. *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535-36 (1991). All three of these requirements must be met to invoke Article 17 liability. If a passenger satisfies the requirements for Article 17 liability, the amount of that liability was once limited to $75,000, *see In re Air Disaster at Lockerbie Scotland*, 37 F.3d 804, 812 (2d Cir. 1994), but 77 international carriers recently agreed to eliminate the $75,000 liability cap and impose strict liability up to 100,000 Special Drawing Rights (SDRs), roughly equivalent to $145,000, *see International Air Transport Association Intercarrier Agreement on Passenger Liability, approved by* D.O.T. Order 96-11-6, 1996 WL 656334 (D.O.T. Nov. 12, 1996). *See* DOT Approval Allows Liability Limits to be Abolished, Air Safety Wk., Nov. 18, 1996. However, a plaintiff may not recover for purely psychic injuries. *See Floyd*, 499 U.S. at 552.

Although the Convention does not define the term "accident," the Supreme Court describes it as "an unexpected or unusual event or happening that is external to the passenger." *Air France v. Saks*, 470 U.S. 392, 405 (1985). Yet "not every identifiable incident or occurrence during a flight is an accident within the meaning of Article 17 even if the incident or occurrence gives rise to an injury." *Quinn v. Canadian Airlines Int'l Ltd.*, No. 35558/91U, 1994 Ont. C. J. LEXIS 1695, at *10 (Ct. Just. May 30, 1994) (air turbulence not an accident); *see Pflug v. Egyptair Corp.*, 961 F.2d 26, 28-29 (2d Cir. 1992) (hijacking is an accident).

Thus, "accident" does not include those typical events that a passenger may be presumed to have accepted, that is to say, those injuries occurring in the normal operation of the aircraft or the airline are not injuries caused by "accidents" under Article 17. *See Saks*, 470 U.S. at 406; *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130, 133 (3d Cir. 1984); *Salerno v. Pan American World Airways, Inc.*, 606 F. Supp. 656, 657 (S.D.N.Y. 1985). Rather, it is only those unexpected "risks characteristic of air travel" that may occur during flight or in the course of embarking or disembarking and that are external to the passenger which may be called "accidents." *See Curley v. American Airlines, Inc.*, 846 F. Supp. 280, 283 (S.D.N.Y. 1994); *see also* Daniel Goedhuis, *National Airlegislations and the Warsaw Convention* 200-01 (1937). A "risk characteristic of air travel" is one that is to some extent unique to air travel, or to which carriage by air is peculiarly susceptible. *See Martinez Hernandez v. Air France*, 545 F.2d 279, 284 (1st Cir. 1976) ("[W]e think the risk of a random attack such as [a terrorist attack inside the baggage claim area] is not a risk characteristic of travel by aircraft, but rather is a risk of living in a world such as ours.").

At the time of the Convention's drafting, the delegates to the Warsaw conference understood "accident" to apply primarily to air disasters such as plane crashes. *See Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 37-38 (2d Cir. 1975); *Second International Conference on Private Aeronautical Law: Minutes* 52 (Robert C. Horner & Didier Legrez trans., 1975) [hereinafter *Minutes*] ("[O]ne can classify aircraft accidents in three categories: those which arise out of errors of piloting; those which arise out of defect in the functioning of the aircraft[;] and those which are designated as being the

result of an Act of God, which is the majority of cases.").

"Since 1929, the risks of aviation have changed dramatically in ways unforeseeable by the Warsaw framers." *Day*, 528 F.2d at 37. As a result, courts regularly have viewed as "accidents" such events as terrorist attacks, *see, e.g., id.* at 37-38, hijacking, *see, e.g., Pflug*, 961 F.2d at 29; *Haddad v. La Compagnie Nationale Air France SA* [1981] E.C.C. 207 (CA Paris 1979), and bomb threats, *see, e.g., Margrave v. British Airways*, 643 F. Supp. 510, 512 (S.D.N.Y. 1986); *Salerno*, 606 F. Supp. at 657. On the other hand, the term has been held not to apply in instances such as death of a passenger by natural causes, *see, e.g., Walker v. Eastern Air Lines, Inc.*, 785 F. Supp. 1168, 1170 (S.D.N.Y. 1992), fights between passengers, *see, e.g., Price v. British Airways*, No. 91 Civ. 4947, 1992 WL 170679, at *3 (S.D.N.Y. July 7, 1992), routine repressurization of the aircraft, *see, e.g., Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400, 413 (E.D. Pa. 1977), or injuries resulting from intoxication, *see, e.g., Padilla v. Olympic Airways*, 765 F. Supp. 835, 838 (S.D.N.Y. 1991).

Given the near absolute liability now imposed by the Convention once an accident is found to have occurred, we invoke its provisions with some degree of care, reading its terms strictly and construing them narrowly. *See McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 316 (1st Cir. 1995) (Article 17 should be read parsimoniously because "there are sound policy reasons to confine . . . liability to the letter of the text, narrowly construed.").

B. *Security Search Not an "Accident"*

We turn now to consider whether the security search of Tseng was an accident under Article 17. Several reasons lead us to part from the district court, which thought it was. In the first place, being subjected to a personal search is a distasteful but common incident of international air travel. As such, it cannot be considered "unexpected" or "unusual," regardless of a passenger's subjective reaction to it. Or, as we just stated, not every incident occurring during a flight or in the process of embarking or disembarking is an "accident" within the meaning of Article 17. As one commentator explained:

> the passenger . . . is aware of the *typical events* related to an air carriage (turbulence, bad-weather, flashes of lightning onto the plane's hull, changes in cabin pressure, dry air in the cabin, so called 'air pockets', more or less 'hard' landings, etc.) and cannot realistically exclude the possibility of such occurrences happening on his flight, so he accepts them.

Elmar Giemulla et al., *Warsaw Convention* art. 17, para. 12 (Bernd Wickert-König trans., 1995).

Security clearance of one degree or another is part of every passenger's experience. And, a search of a passenger may not be said today to be an atypical event in international air travel. Each passenger must routinely submit to a metal detector and interrogation. Not infrequently, these initial procedures lead to additional measures, such as the use of a metal detecting wand or a security search. These events are an anticipated aspect of international travel. Whether appellant expected to be subjected to a security search is not a relevant consideration because she reasonably should have been aware that she might be.

A second reason that the subject search was not an "accident" is because it was part of the airline's normal procedure. Every air carrier is required by Federal Aviation Administration regulations to have in place security procedures to prevent terrorist attacks and to deny transport to anyone who does not consent to be searched upon request. *See* 14 C.F.R. § 129.25(b), (g)(1)-(2). As part of these security procedures, carriers are required to screen all passengers and baggage prior to boarding. *See* 49 U.S.C. § 44901(a) (requiring screening of passengers); 49 U.S.C. § 44906 (applying standards to foreign air carriers); 14 C.F.R. § 108.9(a). In accordance with these requirements, El Al conducts security searches of passengers daily. For example, in 1993 it conducted two to four security searches a day. Hence, as in *Saks*, this case appears simply to involve Tseng's personal reaction to the routine operating procedures of the defendant airline.

A further reason we cannot conclude that this incident was an "accident" within the terms of the Convention is because the Convention does not aim to derogate from the efforts of international air carriers to prevent violence and terrorism, efforts which are widely recognized and encouraged in the law. *See, e.g.*, 49 U.S.C. § 44901(a); 49 U.S.C. § 44906; *Day*, 528 F.2d at 34, 37 n.18 (recognizing the goal of accident prevention); 14 C.F.R. § 108.9(a) (screening utilized to "prevent or deter the carriage aboard airplanes of any explosive, incendiary, or a deadly or dangerous weapon").

Inherent in any effort to detect malefactors is the risk that innocent persons will be subjected to scrutiny and inconvenience. *Cf. Anderson v. Creighton*, 483 U.S. 635, 641 (1987) ("[I]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly con-

clude that probable cause is present . . . ."). This is especially true in airports, where security personnel have only brief interaction with passengers, and must rely on such investigative tools as risk profiles, as was the case here, because there is insufficient time to conduct a more extensive investigation. The inconvenience and embarrassment to the individual passenger of being erroneously searched, therefore, is the price passengers pay for the degree of airline safety so far afforded them. To this end, courts have recognized that airport security officials are to some extent freed from the exacting requirements typically attached to governmental searches of individuals. *See, e.g., United States v. Bell*, 464 F.2d 667, 675 (2d Cir. 1972) (Friendly, C.J., concurring); *New York v. Waring*, 174 AD2d 16, 19 (App. Div. 2d Dep't), *appeal denied*, 79 NY2d 1009 (1992). To suppose the drafters of the Convention aimed to impose close to absolute liability on air carriers for searches that disclosed no danger seems to us highly unlikely.

Our final reason deals with appellant's misapprehension regarding two Articles of the Convention. Tseng appears to assert that El Al's conduct is "wilful misconduct" covered under Article 25 and therefore the carrier's actions cannot constitute an "accident" within the meaning of Article 17. Plaintiff's view is based upon a misunderstanding of the Convention. The two articles are not mutually exclusive; rather the finding of an "accident" under Article 17 is a prerequisite to the imposition of any liability for the personal injuries of a passenger. *See Saks*, 470 U.S. at 396; *MacDonald v. Air Canada*, 439 F.2d 1402, 1404 (1st Cir. 1971). Article 25 simply describes a subset of "accidents" that are more egregious and to which a greater degree of culpability attaches.

In sum, from the above authorities, we derive the following: a carrier is liable in damages for an accident on board the aircraft or in the course of embarking or disembarking that causes the death or wounding or any other bodily injury of a passenger. An "accident" is an unexpected or unusual event that is external to the passenger; but, "accident" does not include those typical occurrences that a passenger is presumed to accept as a characteristic risk of air travel. As a consequence, we hold that even though the event of which plaintiff complains occurred during the course of her embarkation on defendant's airplane, there was no accident and she suffered no bodily injury. Hence, under the terms of Article 17 of the Warsaw Convention, El Al may not be held liable in damages to her.

II The Exclusivity of the Convention

A. *State Cause of Action Lies When Convention Inapplicable*

Having ruled that the search of Tseng does not constitute an "accident," we now must determine whether the Convention provides the exclusive remedy for personal injuries sustained in the course of international air travel, such that Tseng is precluded from pursuing her state law claims for false imprisonment and battery. This is an issue the district court did not decide because it determined the Convention was applicable. The Supreme Court has twice declined to address the exclusivity of the Convention where its terms are *inapplicable*. *See Floyd*, 499 U.S. at 553; *Saks*, 470 U.S. at 408.

In *Lockerbie I* we stated in dictum that "a plaintiff plainly may institute" "a state cause of action when the claim does not arise under the Warsaw Convention." 928

F.2d at 1273. With the issue now squarely before us, we reaffirm that proposition and hold that state law claims are not precluded by the Warsaw Convention where the event or occurrence giving rise to the injury is found to be outside the Convention.

1. Convention's Text

Support for this view is found in the text of the treaty and in the context in which the words in it are used. *See Floyd*, 499 U.S. at 534 (noting that treaty interpretation should begin with the text), *Saks*, 470 U.S. at 396-97 (same); *see also* Vienna Convention on the Law of Treaties art. 31, *open for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 63 Am. J. Int'l L. 875, 885 (1969). The exclusivity provision of the Convention is found in Article 24, which provides:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

The provision clearly states that resort to local law is precluded only where the incident is "covered" by Article 17, meaning where there has been an accident, either on the plane or in the course of embarking or disembarking, which led to death, wounding or other bodily injury, *see Floyd*, 499 U.S. at 535-36. To extend the scope of the Convention's exclusivity beyond that which it expressly provides would require rewriting Article 24

or Article 17, a task only the signatories to the Convention may undertake. *See Saks*, 470 U.S. at 406; *see also Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1027 (2d Cir. 1996) (the task of interpretation begins with the "literal language" of the treaty), *cert. denied*, 117 S. Ct. 959 (1997).

2. Drafting History

The plain meaning of Article 24 is also supported by reference to the drafting history, or *travaux preparatoires*, of the Convention. "[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943); *see also* Vienna Convention, *supra*, art. 32, *reprinted in* 63 Am. J. Int'l L. at 885 (it is appropriate to use supplementary materials to "confirm the meaning resulting from" a contextual reading of the treaty's plain language).

The *travaux preparatoires* indicate that national law was intended to provide the passenger's remedy where the Convention did not expressly apply. During the conference, the Czechoslovakian delegation proposed an additional article that read: "In the absence of provisions in the present Convention, the provisions of laws and national rules relative to carriage in each State shall apply." *Minutes*, *supra*, at 176. The intent of the proposed article was set forth in its proviso: "Provided that the case which arises was not provided for in the Convention, it's the common law which is applicable." *Id.* However, the Czechoslovakian delegation was satisfied that its concern was addressed and withdrew its proposal

when the title of the Convention was amended to refer to the unification of "*certain rules*," thereby indicating "the special nature of the Convention." *Id.* (emphasis added); *see id.* at 188. Other delegates assumed it beyond question that the Convention was nonexclusive where it did not apply. For example, when asked what law would be applicable to cases excluded from the Convention under Article 34 (experimental trials exception), the French delegate exclaimed that "[n]aturally" the common law would apply. *Id.* at 85-86.

B. *Other Decisional Law and Scholarly Comment*

Moreover, a number of courts and commentators have concluded that the Convention provides the exclusive remedy only where its provisions expressly apply. *See, e.g., Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 618 (7th Cir. 1989) (court reached plaintiff's state law claims after determining that the Convention was not implicated); *Abramson*, 739 F.2d at 134 ("if [the Convention] does not apply, it leaves liability to be established according to traditional common law rules"); *Martinez Hernandez*, 545 F.2d at 284; *Tandon v. United Air Lines*, 926 F. Supp. 366, 370-71 (S.D.N.Y. 1996); *Beaudet v. British Airways, PLC*, 853 F. Supp. 1062, 1072 (N.D. Ill. 1994) (state law negligence claim not pre-empted where Convention is inapplicable); *Levy v. American Airlines*, No. 90 Civ. 7005, 1993 WL 205857, at *5 (S.D.N.Y. June 9, 1993), *aff'd*, 22 F.3d 1092 (2d Cir. 1994); *Walker*, 785 F. Supp. at 1173 (S.D.N.Y.); *Fischer v. Northwest Airlines, Inc.*, 623 F. Supp. 1064, 1066 (N.D. Ill. 1985) (denying motion to dismiss state law claims, but dismissing Convention claims); *Rolnick v. El Al Israel Airlines, Ltd.*, 551 F. Supp. 261, 264 (E.D.N.Y. 1982) (permitting pursuit of state law claim after finding

passenger's slip on escalator not to have been within the Convention); Giemulla et al., *supra*, *Warsaw Convention* art. 1, para. 35 ("Where the Convention is not applicable, national law will be applied."); Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* 62 (1988) ("Where there is no 'accident' the Warsaw Convention is probably inapplicable and the passenger may proceed to use local law to prove a claim."); René H. Mankiewicz, *The Liability Regime of the International Air Carrier: A Commentary on the Present Warsaw System* 2, 13 (1981); Luis F. Ras, *Warsaw's Wingspan Over State Laws: Towards a Streamlined System of Recovery*, 59 J. Air L. & Com. 587, 589 (1994). *But see Potter v. Delta Air Lines, Inc.*, 98 F.3d 881, 885 (5th Cir. 1996) ("The Convention's goals of uniformity and certainty would be frustrated were we to allow Mrs. Potter to assert her state law claims, even where the Convention does not provide her a remedy."); *Salazar v. Mexicana Airlines*, 20 Av. Cas. (CCH) ¶ 17,114, at ¶ 17,115 (W.D. Tex. 1986) (same); *Sidhu v. British Airways plc* [1997] 1 All E.R. 193, 207 (H.L. 1996) (U.K.) (same).

C. *Contrary Arguments Refuted*

Two arguments have been advanced in support of the proposition that the Convention is wholly exclusive. We reject both. The first is a structural argument advanced in Great Britain. *See Sidhu* [1997] 1 All E.R. at 205-07. In the view of the English courts, Article 17 is intended to provide exhaustively for the circumstances under which a carrier may be held liable. *See id.* at 207. According to the House of Lords, the purpose of Article 17 is "to prescribe the circumstances, that is to say the only circumstances, in which a carrier will be liable in damages to the passenger for claims arising out of his

international carriage by air." *Id.* Interpreted in this fashion, the English courts read Article 24's reference to "cases covered under article 17" to mean those cases within the Convention not covered by Articles 18 (baggage) and 19 (delay), rather than to distinguish between incidents of personal injury that are or are not within the provisions of the Convention. *See id.*

We recognize that a construction of the Convention by our sister signatories is "entitled to considerable weight," *Saks*, 470 U.S. at 404, but remain unpersuaded to follow the course laid out in *Sidhu*. For one thing, the Convention is not an exhaustive set of rules and guidelines dealing with international air travel, as is evident from its formal title. As one commentator explained, "the Convention was not intended to govern the entire relationship between air carriers and passengers . . . , and does not propose to unify all such rules." Ras, *Warsaw's Wingspan*, *supra*, at 589; *see* Mankiewicz, *The Liability Regime*, *supra*, at 13, 91.

For another, neither the text nor the *travaux preparatoires* reveal an aim to provide in an exhaustive way for the liability of the carrier for all personal injuries. It is widely accepted that one of the two primary purposes of the Convention was to shield carriers from financial catastrophe following in the wake of a major accident. *See MacDonald v. Air Canada*, 439 F.2d at 1405; Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499 (1967). To that end, the Convention limits airline liability for accidents. But the Convention does not purport to insulate carriers from the ordinary risks of doing business, such as keeping their facilities in good repair. An injury to a passenger caused, for example, by a failure of a carrier to keep its walkways in

a safe condition is hardly the type of catastrophic incident that would likely force even a fledgling airline out of business, and cannot be assumed to have been within the contemplation of the drafters of the Convention.

Given the self-described limitation of the Convention, it seems illogical to extend its scope beyond that for which it explicitly provides.[3] It is not tenable to believe the Convention meant to address the more ordinary type of personal injury without some express statement in the text to that effect. Such reading would lead to the absurd result of allowing carriers to escape liability for their negligence—or even their intentional torts—so long as the event giving rise to the injury was not an accident occurring on an airplane or in the course of embarking or disembarking as narrowly circumscribed by the definition of Article 17's meaning.

For example, it is generally accepted that a passenger injured while riding an escalator in the airline terminal does not have recourse under Article 17. *See, e.g., McCarthy*, 56 F.3d at 317 (passenger's slip on escalator not in the course of embarking or disembarking); *Abu Hamdeh v. American Airlines, Inc.*, 862 F. Supp. 243,

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[3] The intention of the drafters appears perfectly plain: gaps left in the regulation of international air carriage would be filled in by subsequent agreements. This point was made in a request by the French delegation to the conference:

> Considering that the Warsaw Convention provides only for certain difficulties relating to air carriage and that international air navigation raises many other questions that it would be desirable to provide for by international agreements,
>
> Expresses the wish:
>
> That, through the offices of the French Government, which has taken the initiative of the convening of these conferences, that there be convened subsequently, new conferences which will pursue the work of unification.

Minutes, *supra*, at 182.

247-48 (E.D. Mo. 1994) (same); *Rolnick*, 551 F. Supp. at 264 (same). Were we to read Article 17 to provide the exclusive remedy for personal injury, a carrier would not be liable for injuries caused by the malfunctioning of an escalator, notwithstanding the fact that it may have recklessly disregarded its duty to keep it in proper repair. Beyond the inequity of forcing the passenger to bear the cost of an airline's negligence, safeguarding an airline from this sort of liability removes the incentive for it to maintain its premises properly—an important goal of domestic tort law. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 4, at 25 (5th ed. 1984) ("When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm."); *cf. Day*, 528 F.2d at 34 (airlines are in better position to assess risks and prevent accidents).

The second argument advanced in support of holding the Convention wholly exclusive is that permitting state law claims under any circumstances contravenes the Convention's goal of uniformity. *See Potter*, 98 F.3d at 885. This argument is flawed in two respects. First, while uniformity is certainly one of the two primary goals of the Convention, such a goal has not always been found feasible in all areas of international travel. Second, even where possible, uniformity cannot justify altering the operating structure of the Convention. *See Zicherman*, 116 S. Ct. at 636 (rejecting application of general maritime law to all Convention cases regardless of whether maritime law would naturally apply). We have read *Zicherman* to instruct specifically that the Convention expresses no compelling interest in uniformity that would warrant us in supplanting an otherwise applicable body of law, here state law. *See Pescatore v.*

Pan American World Airways, Inc., 97 F.3d 1, 11 (2d Cir. 1996). Even to accept the argument that uniformity should prevail where the Convention does not apply does not support the ultimate proposition that the Convention must therefore provide the exclusive remedy, because uniformity could be achieved equally as well by allowing recovery outside the Convention, under a uniform body of law. Of course, once the Convention is ruled inapplicable the carrier may, in a liability suit against it under domestic law, interpose all the defenses available to it under that law.

D. *Passengers' Interests*

Finally, excluding state law claims where the Convention does not apply is inconsistent with the Convention's goal of protecting passengers. Underlying the desire for uniformity and limited liability for the carrier was a desire to balance the interests of the passenger and the carrier. *See Lockerbie I*, 928 F.2d at 1271. In return for certainty and limited liability, the carriers accepted presumed fault when the Convention applied, so that passengers or their survivors could obtain recovery in situations where it might be difficult to prove a carrier's negligence. *See id.*

Over the past several decades, international air transportation has transformed from a fragile, fledgling industry into one that is well established and financially secure. In recognition of the increasing strength of the airline industry, the balance has properly shifted away from protecting the carrier and toward protecting the passenger, *see Day*, 528 F.2d at 37, evidenced by the recent intercarrier agreement abandoning the Convention's liability cap and imposing strict liability up to $145,000.

Reading the Convention to preclude recovery for injuries sustained outside the scope of the Convention would undermine the notion of balancing the interests of the carrier and the passenger. Under such a scheme, the carrier would be disproportionately favored by being absolved from liability for its tortious conduct, except under certain limited circumstances. The passenger would be forced to bear the cost of injury, despite the airline being in a better position to distribute the costs of such injuries and to prevent them from occurring. *See* Keeton, *Law of Torts*, *supra*, § 4, at 24 (Tort law tends to place the burden on the corporation, "who by means of rates, prices, taxes or insurance are best able to distribute" risks and losses.). It is highly doubtful that such a skewing of interests was in the contemplation of the original drafters of the Convention, and such an interpretation is clearly at odds with the current goals of the Convention. Consequently, we hold that where the Convention is inapplicable, a plaintiff may seek recourse under state law.

CONCLUSION

We have reviewed El Al's cross-appeal concerning the district court's findings and conclusions embodied in its judgment regarding Tseng's baggage claim and find it to be without merit. Accordingly, the judgment is reversed with respect to Tseng's personal injury claim and affirmed with respect to her baggage claim. Plaintiff's personal injury cause of action is remanded to the district court, which, should it determine it proper to exercise pendent jurisdiction, may then resolve Tseng's outstanding state law claims in accordance with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 96-7447, 96-7619
Filed June 13, 1997

TSUI YUAN TSENG,

Plaintiff-Appellant-Cross-Appellee,

—against—

EL AL ISRAEL AIRLINES, LTD.,

Defendant-Appellee-Cross-Appellant.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of June, one thousand nine hundred and ninety-seven.

Present:

HON. JON O. NEWMAN
Chief Judge
HON. RICHARD J. CARDAMONE
HON. FRANK X. ALTIMARI
Circuit Judges

MANDATE

Appeals from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, AND DECREED that the judgment of said district court be and it hereby is affirmed in part, reversed in part and remanded to the said district court for further proceedings in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk
By:

BETH J. MEADOR
Beth J. Meador
Administrative Attorney

ISSUED AS MANDATE July 8, 1997

No. 97-475

Supreme Court, U.S.
FILED
JUL 16 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

—v.—

TSUI YUAN TSENG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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57 pp

QUESTION PRESENTED

Whether the Warsaw Convention, a treaty of the United States, exclusively governs and precludes any recovery for a passenger's injuries sustained in the course of "international transportation" if the injuries were not caused by an "accident" within the meaning of Article 17 of the Convention?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-475

EL AL ISRAEL AIRLINES,

Petitioner,

—v.—

TSUI YUAN TSENG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 122 F.3d 99 (2d Cir. 1997) (JA 40-62).[1]

The opinion of the United States District Court for the Southern District of New York is reported at 919 F. Supp. 155 (S.D.N.Y. 1996) (JA 28-37).

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was entered June 13, 1997. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).[2]

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[1] References to the Joint Appendix are indicated as "(JA ___)."

[2] The Rule 29.6 Statement of petitioner EL AL Israel Airlines, Ltd. was submitted with its petition for writ of *certiorari* to the United States Court of Appeals for the Second Circuit.

TREATY PROVISIONS INVOLVED

The articles of the Warsaw Convention[3] expressly involved are Articles 1, 17, and 24.

Article 1(1) of Chapter I, Scope—Definitions, provides:

> (1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

49 Stat. 3014 (1934).

Article 17 of Chapter III, Liability of the Carrier, provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018 (1934).

Article 24 of Chapter III, Liability of the Carrier, provides:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who

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[3] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C.A. § 40105 (1997) (note) ("Warsaw Convention").

have the right to bring suit and what are their respective rights.

49 Stat. 3020 (1934).

STATEMENT

Respondent Tsui Yuan Tseng sued EL AL in the Supreme Court of the State of New York, New York County. (JA 10-11). Tseng alleged assault, false imprisonment and property damage in connection with her security screening conducted by EL AL prior to travelling on an EL AL flight to Israel. (JA 10-11). EL AL removed the case to federal court under 28 U.S.C. §§ 1331 and 1441 because EL AL is a "foreign state" within the meaning of 28 U.S.C. § 1603. (JA 1, R. 1).[4] Following a non-jury trial, the district court dismissed the personal injury claims and awarded damages with respect to the baggage claim. *See Tseng v. EL AL Israel Airlines, Ltd.*, 919 F. Supp. 155 (S.D.N.Y. 1996) (JA 28-37). The court below reversed the dismissal of the personal injury claims, affirmed the property damage award without comment and remanded the case to the district court to address the issue of recovery for Tseng's personal injury claims under state law. *See Tseng v. EL AL Israel Airlines, Ltd.*, 122 F.3d 99 (2d Cir. 1997) (JA 40-62).

Nature of the Case

On May 22, 1993, Tseng arrived at the EL AL terminal at John F. Kennedy International Airport in New York to travel on EL AL flight 008 to Israel. (JA 19). Upon presenting her ticket and passport to a security guard, she was admitted into the EL AL terminal. (JA 7, R. 31, Tr. 11-12).[5] Tseng then approached the security area and, in accordance with standard

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[4] References to the record are indicated as "(JA __, R. __)."

[5] References to the trial transcript are indicated as "(JA __, R. __, Tr. __)."

EL AL pre-boarding procedures, was questioned about her destination and travel plans. (JA 7, R. 31, Tr. 11-12). Based on her responses to these questions, she was considered a "high risk" passenger with an "illogical story" and was escorted into a private EL AL security room where her baggage and person were searched. (JA 7, R. 31, Tr. 69-70; JA 3, R. 10, Ex. E at 24-31, 57-58; JA 22 & 23). EL AL was searching for "[e]xplosives in any size, detonators, size from small, like the cap of the pen, and of course up from that." (JA 7, R. 31, Tr. 75). EL AL did not, at any time, use force in the search, and Tseng did not at any time object to the search. (JA 22).

Proceedings in the District Court

A non-jury trial was held March 7, 8 and 11, 1996 before the Honorable Louis L. Stanton of the United States District Court for the Southern District of New York. (JA 7, R. 31-33, Tr. 1-103).

At the conclusion of the trial, District Judge Stanton ruled, in accordance with his decision in *Shen v. Japan Airlines*, 918 F. Supp. 686 (S.D.N.Y.), *aff'd mem.*, 43 F.3d 1459 (2d Cir. 1994), that: (1) EL AL's allegedly offensive security search constituted an "accident" under Article 17; (2) although EL AL's security suspicions may have been mistaken, there was no evidence of wilful misconduct; and (3) there could be no recovery for Tseng's emotional distress injuries because she sustained no bodily injury. *See Tseng*, 919 F. Supp. 155 (JA 28-37).

Tseng appealed the dismissal of her emotional distress claims to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. §§ 2106 and 2107.[6] (JA 6, R. 29).

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[6] EL AL cross-appealed, pursuant to 28 U.S.C. § 1291, seeking to vacate the property damage award on the basis that the award improperly failed to uphold the fraud standard expressly prescribed by Article 26(4) of the Convention. (JA 7, R. 34).

Decision of the Court of Appeals

On appeal, the court below held that: (1) Tseng's personal injuries were not the result of an "accident" within the meaning of Article 17 of the Convention; (2) the Warsaw Convention does not govern *all* of Tseng's claims against EL AL, *i.e.*, the Convention applies to the passenger's property damage claims, but not to her personal injury claims; and (3) Tseng is entitled to pursue state law causes of action for her personal injury claims against the carrier. *See Tseng*, 122 F.3d 99 (JA 40-62). The decision, entered June 13, 1997, reversed and remanded the District Court judgment with respect to denial of any recovery for Tseng's personal injury claims and affirmed without comment the property damage award. (JA 9). A motion to recall and stay the mandate (issued July 8, 1997) was granted September 8, 1997. (JA 9). EL AL's petition for writ of *certiorari* was granted by the Court on May 18, 1998.

SUMMARY OF ARGUMENT

The judiciary is obliged to enforce the entire Warsaw Convention as drafted and intended. It is undisputed that, by its terms, the Warsaw Convention treaty applies to "all international transportation" and that, within the Convention, there are express provisions governing the liability of a carrier for damages occurring in the course of international transportation by air. The exclusivity dispute essentially centers on whether Article 24 of the Convention must be read to provide that a personal injury action for damages can be "founded" on state substantive law if the passenger does not have a right of recovery under "the conditions and limits set out in" Article 17. EL AL, with the concurrence of the Solicitor General, the International Air Transport Association ("IATA") and the Air Transport Association of America ("ATA"), submits that the court below improperly ruled that the cause of action created by Article 17 is not exclusive and permits resort to state law

when it fails to provide a right of recovery for a passenger injury or death claim.

The decision of the court below begins with the faulty premise that the terms and conditions to recovery under Article 17 must be satisfied for the Convention to "apply" or govern a passenger's claims. *Tseng*, 122 F.3d at 104-05 (JA 54). Article 17 dictates when "a carrier shall be liable" for personal injury or death. Article 17 is the controlling law *whenever* a passenger injury or death is sustained, as here, in the course of international transportation. The conditions set forth in Article 17 determine whether a passenger can recover for alleged harm, not whether the Convention applies to the alleged harm. This distinction has been at the heart of the controversy regarding the exclusivity debate.

Construction of the text of the Convention must begin with Article 1. Article 1, in clear and unambiguous terms, states:

> This convention shall apply to *all* international transportation of persons, baggage, or goods performed by aircraft for hire.

49 Stat. 3014 (1934) (emphasis added). "The word 'all' is important, simply because it is so all-embracing." *Abnett v. British Airways plc*, [1997] 1 All E.R. 193 (H.L. 1996) (U.K.) (Pet. App. 51a).[7] The text of the Warsaw Convention, as a treaty of the United States and the supreme law of the land, may not be judicially re-written on the basis that its express language results in a particular passenger being deprived of a right of recovery. EL AL urges reversal of the judgment of the court below because it is *only* within the Convention that a party may seek recovery for injuries sustained in the course of international transportation by air. The lower court improperly permitted resort to state law causes of action in a Warsaw

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[7] The *Abnett* decision is reprinted in full in the Appendix to the petition for writ of *certiorari*. Citations to *Abnett* are indicated as "(Pet. App. __a)."

Convention personal injury case, thereby creating liability where none was intended to exist.

Tseng's action against EL AL cannot exist outside the terms of the Warsaw Convention because:

(1) In plain and unambiguous terms, Articles 1, 17 and 24 of the Convention provide that with respect to "all international transportation" by air, any action against a carrier "for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger" "can only be brought subject to the conditions and limits set out in this convention";

(2) Resorting to state law claims where the conditions for Article 17 recovery are not met is wholly inconsistent with the Warsaw Convention's goals of uniformity and limited liability and contradicts the comprehensive scheme of "checks and balances" set forth in the Convention's chapter on carrier liability;

(3) The predecessor drafts of the Convention, the discussions by legal experts entrusted with drafting the Convention and the negotiations among the delegates at the Warsaw Conference in 1929 (which led to the final draft of the Convention) reflect that the treaty created the exclusive basis for carrier liability for claims of passenger injury or death;

(4) Governments of signatory nations to the Convention and the carriers which are bound by the Convention have construed this treaty as exclusive;

(5) The Solicitor General, as representative of the United States, has expressed the view that the Convention applies exclusively; and

(6) In *Abnett*, the court of last resort of a sister signatory that shares our common law heritage concluded that the Convention is exclusive.

The decision of the lower courts (including the decision of the court below), permitting resort to state law where a pas-

senger's claim arises during international air transportation but where the conditions precedent to carrier liability under Article 17 are not met, ignore the plain language of the Convention and improperly engage in judicial reconstruction of the express terms of a treaty.

Accordingly, just as the Court corrected twenty years of misapplication of Article 3 by the lower courts in *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989), the Court should correct the misapplication of Articles 17 and 24, reverse the judgment of the court below and hold that the Warsaw Convention exclusively governs a passenger's right, if any, to recover for personal injuries sustained in the course of international transportation by air.

ARGUMENT

I

THE TEXT OF THE WARSAW CONVENTION PROVIDES THE EXCLUSIVE CAUSE OF ACTION FOR A PASSENGER ALLEGING INJURY DURING INTERNATIONAL TRANSPORTATION BY AIR

The Warsaw Convention has been the supreme law of the land since 1934 and is exclusive of all local laws on matters covered by this treaty. *See* U.S. Const. art. II, § 2; 49 U.S.C.A. § 40105; 49 Stat. 3000 (1934); *Air France v. Saks*, 470 U.S. 392, 406 (1985); *see also United States v. Belmont*, 301 U.S. 324, 331-32 (1937) (where judicial treaty interpretation is involved, "state constitutions, state laws, and state policies are irrelevant to the inquiry and decision").[8]

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[8] Only Congress may denounce the Convention or supplement the Convention by creating a statutory right of action in addition to those provided under the Convention. *See Lemnitzer v. Philippine Airlines*, 783 F. Supp. 1238, 1241 (N.D. Cal. 1991), *citing*, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963).

A. The Rules For Treaty Interpretation Are Well Established

The interpretation of a treaty begins "with the text of the treaty and the context in which the written words are used." *Saks*, 470 U.S. at 397; *see also Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991). *Accord* Vienna Convention on the Law of Treaties, arts. 31 & 32, 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1969) (treaties should be interpreted in good faith by considering the ordinary meaning of the words in their context in light of the treaty's object and purpose).[9]

Because the Warsaw Convention is a contract among sovereign nations,[10] the judiciary's role is limited to giving effect to the "shared expectations" and intent of the contracting parties. *Saks*, 470 U.S. at 399; *see also Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982); *Sanjovincenzo v. Egan*, 284 U.S. 30, 40 (1931).[11] This requires the judiciary to give regard to the context in which the terms of the treaty are used and the circumstances under which the treaty was drafted. *See* Restatement (Second) of Foreign Relations Law § 146 (1965); I. Lauterpacht, *Oppenheim's International Law* 953 (8th ed. 1955) (courts should

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[9] Although the United States has not ratified the Vienna Convention on the Law of Treaties, Restatement of Foreign Relations notes that the interpretive provisions "represent generally accepted principles." Restatement (Third) of Foreign Relations Law § 325 cmt. a. (1987); *see also Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 190 (1993); *Weinberger v. Rossi*, 456 U.S. 25, 29 n5 (1982).

[10] *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 282 (1984); *De Geofroy v. Riggs*, 133 U.S. 258, 271 (1890).

[11] Treaty interpretation may require consideration of three major factors: (1) the text of the treaty, (2) the intention of the parties and (3) the object and purpose of the treaty. *See* T.O. Elias, *The Modern Law of Treaties* 72 (1974). "[T]he basic approach most favored is the textual interpretation of a treaty." *Id.*

consider the treaty's "purpose, the motives which led to its conclusion, and the conditions prevailing at the time").

Where, as here, the text is clear, the Court may not "alter, amend, or add to [the] treaty, by inserting any clause, whether small or great, important or trivial." *Chan*, 490 U.S. at 135 (*quoting The Amiable Isabella*, 6 Wheat 1, 71, 5 L. Ed. 191 (1821)). If a court inserts an amendment to a treaty, such conduct is "an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty." *Id.*

Thus, it is clear that the Court is

> to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, [the Court's] duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

Id.

B. The Text Of The Warsaw Convention Establishes The Treaty As The Exclusive Basis For Carrier Liability During International Transportation By Air

1. Article 1 mandates the application of the Warsaw Convention to all international transportation by air

The Warsaw Convention expressly applies to "all international transportation of passengers, baggage or goods performed by aircraft," when "for hire" or "gratuitous[ly] . . . performed by an air transportation enterprise." Article 1 (1). 49 Stat. 3014 (1934). In *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 327 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968), the Court of Appeals for the Fifth Circuit concluded that Article 1 is "unambiguous" and recognized the three express exceptions to the "wide sweep" of Article 1's scope:

(1) "transportation performed under the terms of any international postal convention" (Article 2(2));

(2) "international transportation by air performed by way of experimental trial by air navigation enterprises" (Article 34); and

(3) "transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business" (Article 34).

See also 1 C. Shawcross & K. Beaumont, *Air Law* ¶ VII(112) (4th ed. 1998) ("The Convention did not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it dealt—and the liability of the carrier was one of them—the code was intended to be uniform and to be exclusive also of any resort to the rules of domestic law.").

The drafters identified the exceptions to the Convention's application. The Convention clearly was intended to apply to *all* international transportation by air, except where so noted in the Convention.

Article 1's application to *all* international transportation reflects the two preponderant goals of the drafters in 1929:

(1) to create a uniform law permitting recovery for claims arising out of international transportation, but also

(2) to limit the carrier's potential liability for claims of personal injury or death and avoid the application of varying local laws.[12] *See In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267, 1270 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) (*"Lockerbie"*), *citing*, Andreas F. Lowenfeld & Allen I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-99 (1967); *Benjamins v. British European Airways*, 572 F.2d 913, 919

[12] As noted *infra* at 18 n19, at the time the Warsaw Convention was drafted, carriers were able to disclaim any liability to passengers in a majority of the countries of the world.

(2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Block*, 386 F.2d at 327.

Thus, the Court has recognized the interest of the signatories to provide uniformity in this area of law. *See Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 230 (1996) ("Undoubtedly it was a primary function of the Warsaw Convention to foster uniformity in the law of international air travel"); *Floyd*, 499 U.S. at 552 ("Warsaw Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation"); *see also Reed v. Wiser*, 555 F.2d 1079, 1090 (2d Cir.) (a "fundamental purpose" of the signatories "was their desire to establish a uniform body of world-wide liability rules to govern international aviation, which would supersede with respect to international flights the scores of differing domestic laws, leaving the latter applicable only to the internal flights of each of the countries involved") (footnotes omitted), *cert. denied*, 434 U.S. 922 (1977).

The court below failed to uphold the interest of uniformity by misplaced reliance on the *Zicherman* decision, believing *Zicherman* supports the proposition that "the Convention expresses no compelling interest in uniformity that would warrant . . . supplanting an otherwise applicable body of law, here state law." *Tseng*, 122 F.3d at 107 (JA 60). *Zicherman*, however, addresses the issue of the *measure* of recovery under the Convention, which the Court found had been intended by the drafters specifically to be a matter of the applicable state's law. 516 U.S. at 225 (Article 17 leaves to domestic law what passengers "may be compensated for").

State law supplements the Convention only where the Convention so stipulates (such as compensable damages). Unlike the issue of recoverable damages, the treaty's goal of uniformity is *fundamental* to the issue of substantive carrier liability. *See Garcia v. Aerovias de Mexico, S.A.*, 896 F. Supp. 1216, 1218 (S.D. Fla. 1995) ("[T]his court does not believe that 'concerns about uniformity' are satisfied by the Warsaw

Convention's exclusive remedy. Instead, the Warsaw Convention preempts state law claims and provides an exclusive federal cause of action and remedy for cases involving international air transportation.").

2. Article 24 unambiguously provides that Article 17 is the sole basis for a right of recovery for passenger injury or death during international transportation by air

Articles 17 and 24 provide:

Article 17

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018 (1934).

Article 24

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020 (1934).

The practical construction of the text of Articles 17 and 24, when read with the all-embracing language of Article 1, is that the Convention is the sole basis for a right of recovery against an air carrier for claims arising in the course of inter-

national transportation. *Accord Romano v. British Airways*, 943 F. Supp. 623 (N.D. W. Va. 1996) ("plain language" of Article 24 completely preempts any other cause of action for delay).

A natural reading of Article 24(2) together with Article 24(1) must be:

> *In the cases covered by article 17, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their rights.*

When courts have read Article 24 as a whole, and in the context of the other provisions of the treaty and its stated purpose, they have concluded the Convention is exclusive and preclusive. *See Potter v. Delta Air Lines, Inc.*, 98 F.3d 881, 885 (5th Cir. 1996); *Boehringer-Mannheim Diagnostics, Inc. v. Pan Am. World Airways, Inc.*, 737 F.2d 456, 458-59 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985); *see also Garcia*, 896 F. Supp. at 1218; *Luna v. Compania Panamena De Aviacion, S.A.*, 851 F. Supp. 826, 831 (S.D. Tex. 1994); *Alvarez v. Servicios Aereos de Hondurás, S.A.*, 24 Av. Cas. (CCH) 17,888, 17,890 (S.D. Tex. Jan. 11, 1994); *Jack v. Trans World Airlines, Inc.*, 820 F. Supp. 1218, 1223 (N.D. Cal. 1993); *Velasquez v. Aerovias Nacionales de Colombia, S.A.*, 747 F. Supp. 670, 676 (S.D. Fla. 1990); *Salazar v. Mexicana Airlines*, 20 Av. Cas. (CCH) 17,114, 17,115 (W.D. Tex. Mar. 10, 1986); *Recumar Inc. v. KLM Royal Dutch Airlines*, 608 F. Supp. 795, 797-98 (S.D.N.Y. 1985).

The Fifth Circuit in *Potter*, unlike the court below or the Third Circuit in *Abramson v. Japan Airlines Co.*, 739 F.2d 130, 133 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985), read the express preemption language in Article 24 as preclusive. *Potter* found that the "subject matter of the Convention requires uniformity." 98 F.3d at 885. Thus, upholding the preemptive force of Article 24(2), the Fifth Circuit stated:

> Mrs. Potter . . . reads the preemption language in article 24(2) to prohibit state law causes of action only where a claim has been adjudicated an "accident" and deemed compensable under the Warsaw Convention. We disagree.

98 F.3d at 885 (footnotes omitted).

The Court also should disagree. It is antithetical to interpret Articles 17 and 24(2) as providing that a passenger can seek redress outside the Convention.

a. Courts have erroneously isolated the Article 24 phrase "In the cases covered by Article 17" to avoid finding the treaty exclusive

Despite Article 24's declaration that any personal injury or death action may be based only on the terms of the Convention, courts often have engaged in a painstaking parsing of various phrases within Article 24 to avoid the inexorable conclusion that the Convention's cause of action is exclusive and completely preempts state law claims.

One of the misconstrued phrases in Article 24 is: "In the cases covered by Article 17 . . . ."[13] *See, e.g., Tseng*, 122

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[13] The only authentic text of the Warsaw Convention is in French; thus, the Court has analyzed the French text to guide its analysis. *See Floyd*, 499 U.S. at 535; *Saks*, 470 U.S. at 399. The French text of this phrase reads: "[d]ans les cas prévus à l'article 17". A literal translation of the clause is "in the circumstances anticipated [or "foreseen"] in article 17." *See* Cassell's New French Dictionary 130, 565-66 (5th ed. 1951). The phrase has also been translated: "In the cases provided for in article [17] . . . ." *Second International Conference on Private Aeronautical Law Minutes* at 265 (Robert C. Horner & Didier Legrez trans., 1975) (*"Warsaw Minutes"*).

The English translation of the phrase "cases covered by" is based on the French "prévus" (from the infinitive "prévoir"), which was defined broadly in contemporaneous dictionaries. *See, e.g.*, The Concise Oxford French Dictionary at 662 (1934) ("to foresee, to anticipate, to conjecture, to forecast, to look forward to, to provide for"). Thus, arriving at the meaning of a phrase by isolating and translating its words

F.3d at 104 (JA 54); *Abramson*, 739 F.2d at 133-34 (*quoting Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973)); *see also Sakaria v. Trans World Airlines*, 8 F.3d 164, 173 (4th Cir. 1993), *cert. denied*, 511 U.S. 1083 (1994) (dicta); *Walker v. Eastern Air Lines*, 785 F. Supp. 1168, 1172-73 (S.D.N.Y. 1992); *Fischer v. Northwest Airlines*, 623 F. Supp. 1064 (N.D. Ill. 1985). The court below inaccurately interpreted this clause to mean that the Convention applies only if the passenger has met all of the conditions to a right of recovery under Article 17, to wit—the Convention applies only where it provides a right of recovery (*i.e.*, physical injury caused by an "accident" on board the aircraft or in the course of embarking or disembarking), and then it is exclusive and completely preempts state law. *Tseng*, 122 F.3d at 104-05 (JA 54-55).

According to such faulty reasoning, Tseng, who is not entitled to any recovery under Article 17, has been permitted to resort to state substantive law despite Article 24's express application of state law only as to matters of procedure and measure of damages. The court below states that its narrow reading of Article 24(2) is an express reading of the text, but in reality it is only a reading of the single phrase "in the cases covered by Article 17."

As noted by the Solicitor General[14] and the House of Lords,[15] to achieve a practical construction of the "in the

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results in varying interpretations and, therefore, differing conclusions, none of which is necessarily dispositive. *See Abnett* (Pet. App. 55a) ("exact analysis" of each word of the phrase "in the cases covered by" is improper as the phrase should be interpreted in "consideration of the whole purpose of the article"). A literal translation only is helpful when one is looking at a word, not a phrase, in isolation. *See, e.g., Floyd*, 499 U.S. at 537 ("lésion corporelle"); *Saks*, 470 U.S. at 399-400 ("accident").

[14] *Amicus* Br. at 14 (the phrase simply serves as a "shorthand" for personal injury cases in general, as distinguished from checked baggage or delay cases "covered by Articles 18 and 19").

[15] *Abnett* (Pet. App. 55a) ("The phrase 'in cases covered by article 17' extends therefore to all claims made by the passenger against the

cases covered by" phrase, it must be read in relation to the entirety of Articles 1, 17 and 24. The Convention expressly provides in Article 1 that it *applies to all international transportation*. Article 17 sets forth the circumstances in which a carrier "shall be liable" for harm to a passenger that arose during international transportation: (1) the passenger suffered physical injury; (2) his damages were caused by an "accident"—an unusual or unexpected event or happening external to the passenger—and (3) the accident occurred on board the aircraft or in the course of the operations of embarking or disembarking. *Floyd*, 499 U.S. at 535-36. Courts misread Article 24 to mean that the Convention does not "apply" if the carrier "shall *not* be liable" under Article 17.

The lower court's concern that a carrier could possibly escape liability for injuries occurring on the carrier's premises at the airport (*e.g.*, falling off an escalator) prior to embarking or after disembarking is without merit. *See Tseng*, 122 F.3d at 107 (JA 59-60). For claims of personal injury, Article 17 makes the carrier liable for bodily injury only which is the result of an "accident" "on board the aircraft or in the course of any of the operations of embarking or disembarking."[16] Consequently, the Convention does not purport to extend to claims arising before the process of embarking or after disembarking because the harm would not have been sustained in the course of international transportation. However, if a passenger cannot establish the substantive conditions for a right of recovery under Article 17 (*i.e.*, bodily

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carrier . . . other than claims for damage to . . . baggage . . . under article 18 and claims for delay . . . under article 19.").

[16] Respondent does not dispute that she was in the course of embarkation. The security search conducted by EL AL satisfies the tests followed by the courts of appeals to determine if a passenger is in the course of embarkation or disembarkation. *Compare Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8 (2d Cir. 1990); *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613 (7th Cir. 1989); *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

injury (*Floyd*) caused by an "accident" (*Saks*)[17] in the course of international transportation), the passenger is not permitted to seek recourse outside the Convention.[18]

An undisputed goal of the Warsaw Convention delegates was to limit the potential liability of air carriers "in order to foster the growth of the fledgling commercial aviation industry." *Floyd*, 499 U.S. at 546. As acknowledged by the Court, the signatories in 1929 "were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers."[19] *Id.* Accordingly, the Court

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[17] The district court held that the "routine search, applied erroneously to plaintiff in the course of embarking on the aircraft, is fairly accurately characterized as an accident; that is to say, an unexpected or unusual event or happening external to the passenger." *Tseng*, 919 F. Supp. at 158 (JA 31-32). In rendering its decision, the court expressly relied on the definition of an Article 17 "accident" as set forth in *Saks*, "flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Tseng*, 919 F. Supp. at 157 (*quoting Saks*, 470 U.S. at 405) (JA 30).

The term "accident" as used in the 1929 French text is varied enough to include circumstances far greater than suggested by the court below. Contemporaneous definitions of the term "accident" are broad and, thus, "accident" should be interpreted as such. *See, e.g.*, The Concise Oxford French Dictionary at 8, defining accident as "accident, chance, occurrence, incident; mishap, misfortune, casualty; unevenness, irregularity in structure, varied aspect, undulation; (med.) unexpected symptom, sudden complication; (mus. paint.) accidental; (gram.) accidence."

[18] This is consistent with the liability rules of civil law countries, upon which the Convention is designed. In civil law countries, nearly every right of action has been created by code or statute and, thus, if a person cannot satisfy the express terms of the code provision, he does not have a right of action. *See, e.g.*, Sam Walker, *Conflict of Laws*, 23 Akron L. Rev. 19, 23 (1989); *see also Lockerbie*, 928 F.2d at 1279 ("[T]he Convention was drafted against a civil law background that placed the cause of action in contract. . . . The bodies of common and civil law of contract are not identical.") (citations omitted).

[19] The court below had stated that "excluding state law claims where the Convention does not apply is inconsistent with the Convention's goal of protecting passengers." *Tseng*, 122 F.3d at 107 (JA 61). The

concluded that the term "lésion corporelle" in Article 17 refers only to bodily injury. The Warsaw signatories made a "legislative choice" to deny passengers recovery for psychic injuries unaccompanied by physical injury.[20] *Id.* Likewise, the contracting parties' "legislative choice" that the Convention provide the sole basis of redress for a personal injury sustained during international transportation should be respected in this case.

The court below misconstrued the IATA Intercarrier Agreement on Passenger Liability. *See Tseng*, 122 F.3d at 107-108 (JA 61-62).[21] As pointed out in the *amici* briefs submitted by IATA, the ATA and the Solicitor General in support of the petition, the IATA Intercarrier Agreement continues to presume that the Warsaw Convention is the exclusive basis for a plaintiff's action for personal injury or death arising during international transportation.[22]

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delegates clearly desired to balance the interests of the passengers with those of the carrier; but, the Convention's compromise, with respect to passengers, was foregoing the then acceptable full disclaimer of liability on the part of the carrier in favor of a new imposition of liability only as prescribed by the Convention. *See Warsaw Minutes* at 47-48 (cited in full in petition for writ of *certiorari* at 12-13 n8).

[20] The drafters also provided, in Article 20, for situations where the passenger could have sustained bodily injury as a result of an Article 17 accident and still be entitled to no recovery. Although carriers operating into and through the United States have waived the Article 20 defense, this article is another example where the drafters made a conscious choice to deny recovery to an injured passenger. *See* Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order E-28680, May 13, 1966, 31 Fed. Reg. 7302 (1966).

[21] *International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention*, approved by D.O.T. Order 97-1-2, 1997 WL 4834 (D.O.T. Jan. 8, 1997). The Court must look to the "expectations" of the "continental jurists" who drafted the Convention. *Saks*, 470 U.S. at 399; *see also Rocca v. Thompson*, 223 U.S. 317, 331 (1912).

[22] This is necessarily so because a treaty is the supreme law of the land in the United States and, thus, the majority of Foreign Air Carrier

To permit a state law claim when a passenger fails to show that an accident caused the alleged injury or that he or she suffered bodily harm would create carrier liability where, by the express terms of Articles 1, 17 and 24, none was intended to exist. The court below concluded that Tseng's injury was not caused by an Article 17 "accident".[23] The court below, therefore, should have affirmed the dismissal of Tseng's personal injury claims against EL AL.

While the court below may have been motivated by a desire to provide Tseng with a cause of action, the decision effectively, and improperly, subordinated the supreme law of the land to the common law of the several states. *See Velasquez*,

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Permits on file with the Department of Transportation stipulate that the Warsaw Convention exclusively governs international air transportation as evidenced by the recognition afforded the Warsaw Convention in the Permit's Attachment (a/k/a Appendix). *See also* ATA *Amicus* Br. at 7; JA 26; JA 7, R. 35 (Defendant's Exhibit A. Certified copy of EL AL's International Passenger Rules and Fares Tariff, NTA (A) No. 324, ¶C.A.B. No. 530, Rule 55 *LIABILITY OF CARRIERS* "(B) *LAWS AND PROVISIONS APPLICABLE* (1) Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention . . . unless such carriage is not 'international carriage' as defined by the Convention.").

[23] Based on the doctrine that a treaty construction resulting in a favorable recognition of rights under the treaty supersedes a construction resulting in a restriction of rights, the search of Tseng could be considered an "accident" to bring her claim within Article 17. *See, e.g., De Geofroy*, 133 U.S. at 271 (just as the District of Columbia was considered a "state" under the terms of a treaty between the United States and France, Tseng's claims may be considered the result of an "accident" under the Convention). *See Thach v. China Airlines, Ltd.*, No. 95 Civ. 8468, 1997 WL 282254 (S.D.N.Y. May 27, 1997); *Uwagbai v. Alitalia Airlines*, 24 Av. Cas. (CCH) 17,811 (D. Mass. Jan. 20, 1994). *Compare Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir.), *reh'g denied en banc*, 130 F.3d 446 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1042 (1998); *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978); *Curley v. American Airlines, Inc.*, 846 F. Supp. 280 (S.D.N.Y. 1994); *Walker v. Eastern Airlines*, 785 F. Supp. 1168 (S.D.N.Y. 1992).

Tseng still, however, would be entitled to no recovery from EL AL, because she did not sustain bodily injury. *See Floyd*, 499 U.S. 530.

747 F. Supp. at 676. *Accord Finkelstein v. Trans World Airlines, Inc.*, 15 Av. Cas. (CCH) 17,379, 17,380 (N.Y. Sup. Ct. Sept. 28, 1978) ("To the extent that some Federal decisions seem to indicate the viability of independent tort actions and the non-exclusivity of the Convention this Court, first, is not bound thereby and, second, does not agree therewith."). Allowing Tseng recovery for harm occurring in the course of international transportation required the Court to distort the text of Articles 1, 17 and 24 and to disregard the context in which the words in these articles were used by the drafters. As noted by the Court in *Saks*:

> Until Article 17 of the Warsaw Convention is changed by the signatories, it cannot be stretched to impose carrier liability for injuries that are not caused by accidents. It remains "our duty to enforce the treaties of the United States, *whatever they may be*, and . . . the Warsaw Convention remains the supreme law of the land."

Saks, 470 U.S. at 406 (*quoting Reed*, 555 F.2d at 1093) (emphasis added).

b. The lower courts similarly have misread the Article 24 phrase "any action for damages, however founded" to hold that a passenger's cause of action may be "founded" on state law

As noted by the court below in another of its decisions, *Lockerbie*, 928 F.2d at 1282, the "however founded" language has been subject to two interpretations. The incorrect view is that a state law cause of action, "however founded," may be brought against the carrier, and that the Convention provides only the exclusive remedies.[24] The correct, and the only

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[24] The Eleventh Circuit noted the divergent analyses of Article 24 by district and appellate courts. *See Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1482 n33 (11th Cir. 1989), *aff'd*, 499 U.S. 530 (1991); *see also In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 414 n25 (9th Cir. 1983); *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 942 (2d Cir. 1980); *In re Air Crash Disaster at*

sensible, construction of Articles 17 and 24 is that a plaintiff, whatever his damages, cannot circumvent the Convention by bringing an action other than one under Article 17. *See Potter*, 98 F.3d 881; *Jack*, 820 F. Supp. at 1223, 1225; *Stanford v. Kuwait Airlines Corp.*, 705 F. Supp. 142, 144 (S.D.N.Y. 1989) ("[T]he explicit language of the Convention . . . specifies that an action arising from international air carriage, 'however founded, can only be brought subject to the conditions and limits set out in this Convention'.").

The "however founded" phrase in Article 24 derives from the drafters' concern that certain heirs of a deceased passenger would lack standing under Article 17 because the Convention provides for a right to sue in contract but not in tort. *See, e.g., Potter*, 98 F.3d at 886 (recognizing that prior to the Convention and under the law of certain countries, passengers who were injured could sue for damages in either tort or contract but the Convention's express cause of action requires that they proceed only in contract); *see also Jack*, 820 F. Supp. at 1222; René H. Mankiewicz, *The Liability Regime of the International Air Carrier* 92, 93 (1981) (citations omitted). *Compare Benjamins*, 572 F.2d at 918 (posited alternative reading that the "however founded" language could have referred to "a number of possible factual bases for the envisioned action").

The phrase was intended to eliminate multiple actions and liabilities that could arise in some signatory nations where the carrier's liability can be based on principles of either tort or contract law. The *Lockerbie* court surmised that, based upon the drafting history of Article 24, the phrase "however founded" was intended to "prevent an injured party's relatives

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Gander, Newfoundland on Dec. 12, 1985, 660 F. Supp. 1202, 1221 & n43 (W.D. Ky. 1987); *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737, 740 (S.D. Fla. 1986); G. Nathan Calkins, Jr., *The Cause of Action Under the Warsaw Convention*, Part II, 26 J. Air. L. & Com. 323, 327-28 (Autumn 1959); H. Drion, *Limitations of Liability in International Air Law* 70-71 (1954).

from bringing an independent action, outside the contract action which the injured person himself might bring, for loss of support." *Lockerbie*, 928 F.2d at 1285. *Accord Jack*, 820 F. Supp. at 1222 (contract/tort distinction eliminated in favor of cause of action "under the contract-law-based Convention").

A leading commentator's discussion of the text of Article 24 illustrates the misinterpretation of Articles 17 and 24 by the lower courts:

> The Convention *efficiently prevents the application of its liability rules from being circumvented by an action in tort* by providing in Article 24 that any action for damage under Articles 17 to 19, 'however founded', *i.e.* whether in contract or in tort, 'can only be brought subject to the conditions and limits set out in this Convention'; . . . . Consequently, 'the Convention *cuts down on common law causes of action*'; . . . .

Mankiewicz at 93 (citations omitted) (emphasis added). *Accord Potter*, 98 F.3d at 886 & n12; *see also In re Air Crash Disaster at Warsaw, Poland on Mar. 14, 1980*, 535 F. Supp. 833, 844-45 (E.D.N.Y. 1982) ("the Warsaw Convention specifically controls and exclusively governs any and all claims for damages arising out of the death or injury of a passenger engaged in international air transportation, and plaintiffs cannot maintain a separate wrongful death action for damages under California law"), *aff'd*, 705 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983).

Hence, courts improperly have parsed and strained the reading of the "however founded" phrase. The phrase was intended only to confirm that the Convention is the sole source of a passenger's right to sue for personal injury or death, irrespective of whether there would be a right under the laws of the various nations absent the Convention.

3. The preamble and other articles demonstrate the uniform and comprehensive framework regulating carrier liability during international transportation by air

The reference to international uniformity of law in the treaty's preamble, the scheme of checks and balances to determine carrier liability and the articles expressly reserving only certain areas for local law demonstrate that the Convention provides the exclusive basis for damages against a carrier.

a. The preamble makes clear that the Convention unifies the rules for the subjects addressed

The Court should uphold the purpose and object of the Convention as stated in the text of the Preamble:

> Having recognized the advantage of *regulating in a uniform manner the* conditions of international transportation by air in respect of the documents used for such transportation and *of the liability of the carrier*, . . .

49 Stat. 3014 (1934) (emphasis added).

The preamble proclaims, clearly and plainly, the drafters' express desire for uniform and exclusive application of the Convention to international transportation. *See Eggink v. Trans World Airlines, Inc.*, 22 Av. Cas. (CCH) 17,731, 17,733, 1990 WL 6553 (S.D.N.Y. Jan. 22, 1990) (recognizing the Preamble's express declaration of the "central purpose of the Convention"). *Accord In the Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, 1952 I.C.J. 176, 196, 1952 WL 51 (I.C.J.) (citations omitted) ("The purposes and objects . . . were stated in its Preamble. . . . In these circumstances, the Court can not adopt a construction by implication. . . . 'It is the duty of the Court to interpret the Treaties, not revise them.' ").

b. The subject of "Liability of the Carrier" is regulated under its own chapter

The Liability Chapter of the Convention guides the Court as to the only circumstances of carrier liability. *See Abnett* (Pet. App. 52a-56a). Articles 17 through 25, when read sequentially, regulate in a uniform manner whether a carrier will be liable for a claim by a passenger:

Article 17	Provides when the carrier "shall be liable" for passenger injury or death.
Article 18	Provides when the carrier "shall be liable" for checked baggage and cargo.
Article 19	Provides when the carrier "shall be liable" for delay.
Article 20	Provides an exception to the presumptive liability of the carrier under Article 17.
Article 21	Provides another exception to the presumptive liability, in whole or in part, based on the contributory negligence of the passenger.
Article 22	Provides the maximum of the carrier's liability, subject to any exceptions to liability in the two preceding articles.
Article 23	Provides that any disclaimer of liability of the carrier is "null and void."
Article 24	Provides that any action by the passenger will lie only under the Convention.
Article 25	Provides that all of the provisions limiting the carrier's liability are lost if there is wilful misconduct on the part of the carrier.

This is the context in which Article 24 must be read. Articles 17, 18 and 19 create presumptive liability on the part of

the carrier, which may be negated, in whole or in part, under Articles 20 and 21. Article 22 limits the damage exposure of the carrier, unless Article 25 precludes the carrier from availing itself of the prescribed limit. Article 23 expressly voids any attempt by the carrier to disclaim liability and Article 24, in counterpoint, precludes a passenger from obtaining a recovery outside the terms of the Convention.

Thus, the scheme of the Liability Chapter precludes the Court from altering the delicately balanced rights of the passenger against those of the carrier.

c. The judiciary may not invoke state law where the Convention does not expressly so provide

It is telling to note that, where the drafters of the Convention intended that "local" law apply to a particular matter, the Convention expressly so states:

Article 21 — "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability."

Article 24(2) — "In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

Article 25(1) — "The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on

his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct."

Article 28(2) — "Questions of procedure shall be governed by the law of the court to which the case is submitted."

Article 29(2) — "The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted."

See Boehringer-Mannheim, 737 F.2d at 458; *Benjamins*, 572 F.2d at 917; *Reed*, 555 F.2d at 1092; *see also Potter*, 98 F.3d at 886 ("where the drafters of the Convention concluded that uniformity could not be achieved, they provided expressly for recourse to local law"), *citing*, *Zicherman*, 516 U.S. 217.

Article 17 does *not* contain any language permitting resort to state law; it is Article 24(2) that directs courts when to apply state law (to the issues of standing and compensable damages), yet the court below erroneously read such a provision into Article 17 of the Convention.

Just as the Court in *Chan* rejected the majority of decisions of the lower courts which had read an "adequate notice" requirement into Article 3 of the Convention (490 U.S. at 134 n5), the Court should reject the decisions (including that of the court below) which have read into Article 24 that a passenger is entitled to resort to state substantive law where Article 17 does not provide a right of recovery. Although upholding the terms and conditions of the Convention as the expression of the drafters' intent may result in instances where, as here, a passenger is not entitled to a right of recovery under the Convention, such a result must be accepted. Any other reading of the Convention would be at odds with the drafters' intentions. As the Court stated in *Chan*, "we must thus be governed by the text [of the treaty]." 490 U.S. at

134. And here, both the text and the context within which the written words are used preclude resort to state substantive law for personal injury or death claims against the carrier.

II

SUPPLEMENTARY MEANS OF INTERPRETATION OF THIS TREATY CONFIRM THAT THE WARSAW CONVENTION IS EXCLUSIVE

The terms of the Convention are not ambiguous and a natural reading of Articles 1, 17 and 24, when read in conjunction with the Convention as a whole, compel the conclusion that the cause of action under Article 17 is exclusive. The Court nevertheless may look "beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties" to confirm or ascertain the meaning of Articles 1, 17 and 24, if it finds these articles to be "difficult or ambiguous passages." *Volkswagenwerk*, 486 U.S. at 700 (*quoting Saks*, 470 U.S. at 396, 400 (*quoting Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943))); *see also Zicherman*, 516 U.S. at 224-27 (drafting history (*travaux préparatoires*) confirmed the Court's interpretation); *Floyd*, 499 U.S. at 535 (same).[25]

Additional aids to interpretation of the Warsaw Convention may include the post-ratification conduct and subsequent

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[25] *But see Chan*, 490 U.S. at 134 (in discussing whether to consider drafting history of Warsaw Convention, the Court held where, as here, the text is clear, the court has no power to insert an amendment); *Saks*, 470 U.S. at 400 (it is proper in interpreting a treaty to refer to the records of its drafting and negotiation to resolve ambiguities in the text); *Santovincenzo*, 284 U.S. at 40 (it is unnecessary to invoke liberal construction of treaties where the instant case merely calls for a reading of the provisions according to its terms; there is no applicable principle which permits us to narrow the ordinary meaning of terms); Vienna Convention on the Law of Treaties, Art. 32 (permitting resort to drafting records only if the text "leaves the meaning ambiguous or obscure; or . . . leads to a result which is manifestly absurd or unreasonable").

interpretation of the contracting parties to the Convention. *See, e.g., Zicherman*, 516 U.S. at 217; *Saks*, 470 U.S. at 403. *Accord Vimar Seguros v. M/V Sky Reefer*, 515 U.S. 528 (1995) (declining to interpret Hague Rules in a manner contrary to every other nation addressing the issue); *Franklin Mint Corp.*, 466 U.S. at 259 (the first 50 years of conduct of the contracting parties cannot be ignored).

The Court also has accorded the opinions of "sister signatories . . . great weight." *Saks*, 470 U.S. at 404; *see also Floyd*, 499 U.S. at 550; *Chan*, 490 U.S. at 135; *Benjamins*, 572 F.2d at 919. *Accord Abnett* (Pet. App. 48a-49a) (decisions by foreign courts, where they are of the appropriate standing and quality, may be helpful in pointing towards the interpretation of the Convention).

A. The Drafting And Negotiating History Reinforce The Conclusion That The Warsaw Convention Was Intended To Be Exclusive

In 1923, the French government, recognizing the need to adopt uniform rules relating to liability of air carriers, invited nations of the world to attend an international conference in Paris. Two years later, the French government distributed a preliminary protocol in advance of the First International Conference on Private Air Law. *See* John Jay Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. Air L. 26, 27-29 (1932).

At the 1925 Paris Conference, the official delegates from 44 countries, along with observers from the United States, Japan and Hungary, approved a draft convention. In addition, the delegates created a commission of international aviation experts, known as the *Comité International Technique d'Experts Juridiques Aeriens* ("CITEJA"), which continued to meet and revise the draft convention and to investigate other issues of private air law.

The draft convention in 1925 included the precursor to Articles 17 and 20 (Article 5 below).[26] From 1925 through 1928, the CITEJA members convened and revised the draft convention. At the Third Session of CITEJA, held in 1928, the draft convention contained three major chapters: the first, addressed definitions and objectives; the second, documents of carriage; and the third, liability rules relating to the carrier. G. Nathan Calkins, Jr., *The Cause of Action Under the Warsaw Convention*, Part I, 217, 221 (Summer 1959). All sources of carrier liability appeared in Article 22 (now Article 17).[27]

Article 5 [1925 Conference]	Article 22 [outset of Third Session]
The carrier is liable for *accidents, losses, breakdowns, and delays*. It is not liable if it can prove that it has taken reasonable measures designed to preempt damage	The carrier shall be liable for damage during carriage: (a) In case of death, wounding, or other physical bodily injury of every description suffered by a traveler;

1. The Warsaw Conference narrowed the 1928 preliminary draft of Article 17, which had proposed to make the carrier liable for "death, wounding or other bodily injury *of every description* suffered by a traveler"

During the Third Session, Article 22 became Article 21 (set forth below)[28] and liability was narrowed from encompassing injury of "*every description* suffered by a traveler" to simply

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[26] The *Saks* decision provides the language from the 1925 Conférence Internationale de Droit Privé Aérien in Paris. 470 U.S. at 401 (emphasis added).

[27] *Jack*, 820 F. Supp. at 1221-22 (emphasis added) (*quoting* Calkins, Part I at 221 (*reprinting and translating* preliminary draft of convention at outset of Third Session)).

[28] *Saks*, 470 U.S. at 401 (*quoting Warsaw Minutes* at 264-65).

"injury suffered by a passenger." The following year at the Warsaw Conference,[29] the delegates inserted the requirement of an accident and, in effect, further narrowed the terms of liability for death or bodily injury to the current Article 17,[30] *i.e.*, liability for harm "suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." The qualifying accident clause did not even appear until the end of the Warsaw Conference. *Warsaw Minutes* at 205; *Jack*, 820 F. Supp. at 1225.

Article 21 [Warsaw Conference]	Article 17 [The Warsaw Convention]
The carrier shall be liable for damage sustained during carriage:	The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. 49 Stat. 3018 (1934).
(1) in the case of death, wounding, or any other bodily *injury suffered by a traveler*;	

[29] In 1929, at the Second International Conference on Private Air Law held in Warsaw, Poland (the "Warsaw Conference"), the Convention was born. The Convention was signed by 23 states; it entered into force on February 13, 1933, 90 days after the deposit of the instruments of ratification by five states. By the end of 1933, most European nations had ratified the Convention and on October 29, 1934, the United States became a High Contracting Party. *Lockerbie*, 928 F.2d at 1271; *see also Franklin Mint Corp.*, 466 U.S. at 246-47.

[30] During the Warsaw Conference, the drafters also split Article 21 into three separate articles, now Articles 17, 18 and 19, "primarily because delegates thought that liability for baggage should commence upon delivery to the carrier, whereas liability for passengers should commence when the passengers later embark upon the aircraft." *Saks*, 470 U.S. at 402.

The narrowing of the circumstances when the carrier "shall be liable" shows that the Convention affirmatively limits carrier liability to injuries which are the result of an "accident" sustained during international transportation.

2. The evolution of Article 24 confirms that any action against the carrier must be based on the Convention

Comparing the earlier drafts of Article 24 (Articles 26 and 27 below),[31] with the draft presented at the Warsaw Conference[32] and its present language further validates a finding of exclusivity:

Article 26	Article 27
[outset of Third Session in 1928]	
In case of accident, loss, damage or delay, the liability action may not be brought against the carrier except on the basis of this convention, unless the damage arises through an intentional unlawful act as to which he bears the liability;	In case of death of the person holding the cause of action, every liability action, however founded[,] may be exercised, within the terms and limits provided by this convention, by those persons to whom such action belongs in accordance with the national law of the deceased or, in default of such law, in accordance with the law of the place of his last permanent residence.

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31 Calkins, Part I at 221-23 (preliminary draft of convention at outset of Third Session) (emphasis added).

32 *Warsaw Minutes* at 265.

Article 24 [Warsaw Conference]	Article 24 [The Warsaw Convention]
In the cases provided for in Article 21 [now Articles 17, 18 and 19], even in the case of death of the interested party, any liability action, however founded, can be brought only under the conditions and limits set forth by the present Convention.	(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
If the damage arises from an intentional illicit act for which the carrier is responsible, he will not have the right to avail himself of the provisions of this Convention, which exclude in all or in part his direct liability or that derived from the faults of his servants.	(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights. 49 Stat. 3020 (1934).

Article 26 of the CITEJA draft stated that in the case of accident, damage, loss or delay, the liability action could only be brought "on the basis of this convention" and, thus, that the Convention would be the exclusive basis for a passenger's recovery.[33] Article 27 of the draft provided that for death actions, "every liability action, however founded, may be exercised within the terms and limits provided by this Convention . . . ."[34]

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[33] The fact that the delegates chose to confine liability to the terms of the Convention, rather than *expand* carrier liability to include national law, demonstrates their goal of limiting the circumstances of liability and undermines the lower court's interpretation of Articles 17 and 24.

[34] As discussed *supra* at 22, the "however founded" language was inserted to resolve the issue of the standing of the heirs of a deceased

The CITEJA drafters subsequently merged Articles 26 and 27 into one article, which became Article 24.[35] The CITEJA Reporter explained the purpose of this merger:

> Since there had been eliminated from Article 27 the part relating to the person who would be entitled to bring suit on the death of the holder of the right, *the article no longer contained more than a declaration that all action[s] must be brought on the basis of the convention. This was a repetition of the same idea contained in Article 26.* The drafting subcommittee had therefore combined the two articles in a new Article 24 . . .

Jack, 820 F. Supp. at 1223 (*quoting* Calkins, Part I at 206 (*Proceedings of the Third Session of CITEJA* 66-67)) (emphasis added).

Thus, the draft continued to emphasize that the passenger's cause of action "can be brought only under the conditions and limits set forth by the present Convention." This history shows that the editing committee and CITEJA members viewed the predecessor articles to Article 24 as plainly requiring that suits be brought against the carrier solely "on the basis of the Convention." *Jack*, 820 F. Supp. at 1223 (comprehensive analysis of the drafting history confirms that the word "conditions" in Article 24 should be read as meaning the "fundamental basis," such that any action for damages could only be brought "on the basis of the Convention," *i.e.*, the Convention is exclusive).

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passenger who have no contractual relationship with the carrier and technically could not have a right of action under the contract-based regime of the Convention.

35 *Warsaw Minutes* at 265 (preliminary draft of convention).

3. The delegates at the Warsaw Conference debated the period of carriage that would implicate carrier liability; however, presumptive and preemptive liability remained unchanged

The delegates at the Warsaw Conference must have accepted that the Convention would be presumptive and exclusive, as evidenced by the delegates' focus on narrowing the "period of carriage"—*i.e.*, whether carriage extends "from the moment when travelers, goods or baggage enter into the aerodrome of departure to the moment when they leave the aerodrome of destination." *Warsaw Minutes* at 264.[36]

The Warsaw Conference minutes are probably "more notable" for their lack of discussion regarding preemption. *Jack*, 820 F. Supp. at 1225. The one and only comment expressly relating to the preemptive language of Article 24 was by the British Delegate, the only representative of a common law nation, who stated:

> We have at the beginning of the article: ". . . any liability action however founded can only be brought under the conditions and limits provided for by the present Convention."
>
> It's a very important stipulation which *touches the very substance of the Convention*, because this *excludes recourse to common law*; originally, it was a separate article.

Warsaw Minutes at 213 (emphasis added); *see also id.* at 65 ("In any case, recourse to national law must be ruled out."), 66 ("we are absolutely opposed to a formula that would lead to the application of national law"), 175-76 (the drafters rejected the

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[36] The delegates provided language in Articles 17 and 18 for different periods of carriage for passenger and cargo. The drafters realized that a carrier has control over goods at a different time than it would have "direction and supervision" over a passenger. *Martinez Hernandez v. Air France*, 545 F.2d 279, 282 (1st Cir. 1976), *cert. denied*, 430 U.S. 950 (1977).

Japanese Delegate's proposal which would provide for "freedom of choice" to apply a prior agreement for dispute resolution).

The drafters intended the Convention to provide the exclusive cause of action for any injury or death claim against the carrier, so long as the harmful event occurs either on board the aircraft or in the course of embarking or disembarking. Commenting on the Warsaw Conference, the Chairman of the U.S. Delegation at the Hague Conference to Amend the Warsaw Convention, 1955, stated:

> There is nothing to indicate any change in direction which would modify the original draft from a convention creating a complete system of liability based on the contract of carriage to one which merely imposed conditions and limitations on rights of action otherwise accorded under national law. On the contrary, the *evidence is overwhelming* that the conference reaffirmed the theory throughout that the *convention would establish a system of liability complete in itself*. This evidence is of two types. The first is the adoption of amendments to the Citeja draft which are compatible only with the complete liability system philosophy. The second is specific statements made on the floor of the conference.

Calkins, Part I at 227 (emphasis added).

B. The Conduct Of The Contracting Nations Has Been Consistent With The Signatories' Intent That The Warsaw Convention Provides The Exclusive Cause Of Action

After 1929, representatives of signatory nations convened on several occasions to amend the Warsaw Convention and to clarify provisions that may have been misinterpreted by the parties. Amendments to the language of Articles 17 and 24 were proposed at two such Conferences, the Guatemala City Conference in 1971 and the Montreal Conference in 1975.

These proposed amendments were to further the signatories' expectation that the Convention provides the exclusive basis for a right of recovery for damages sustained in the course of international transportation.

1. The Guatemala City Protocol reflects the signatories' understanding that the unamended Warsaw Convention makes a carrier potentially liable only for "accidents" and that the Convention is exclusive

Although the Guatemala City Protocol is not in force, the Court has referred to the amendments adopted at the 1971 Guatemala City International Conference on Air Law to clarify the meaning of the term "accident" in Article 17. *Saks*, 470 U.S. at 403-04. The Guatemala City delegates approved an amendment to Article 17[37] that would impose liability on a carrier for an "event which caused the death or injury," rather than for an "accident which caused" the passenger's injury. *Id.* at 403. The Guatemala City delegates discussed the fact that the term "event" expanded carrier liability to cover acts that may not be considered accidents. *Saks*, 470 U.S. at 403-04. The delegates also added a clause exempting the carrier from liability if the death or injury resulted "solely from the state of health of the passenger." *Id.*

In addition to amending Article 17, the delegates at Guatemala City amended Article 24(2). The phrase "in the cases covered by Article 17" was replaced with "in the carriage of passengers and baggage." This change in language was not intended to be a substantive change, but rather to reflect the consolidation of baggage actions with the passenger injury actions. The delegates also revised the "however founded" clause in Article 24 to read: "any action for dam-

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[37] *See* International Civil Aviation Organization, 2 *Documents of the International Conference on Air Law, Guatemala City*, ICAO Doc. 9040-LC/167-2 at 189 (1972).

ages, however founded, whether under this Convention or in contract or in tort or otherwise, ..." This additional language is consistent with the signatories' construction of Article 24 as exclusive.[38]

The unamended Warsaw Convention limits carrier liability exclusively to injuries caused by "accidents" in the course of international transportation; carriers are not liable for "events" other than "accidents" and there is no right of recourse to national law.

2. Montreal Protocol No. 4 furthers the exclusivity objective, while leaving Article 17 unchanged

Montreal Protocol No. 4, drafted in 1975, changes the language in Article 24; Montreal Protocol No. 4 does *not* change Article 17.[39] If ratified, Article 24, in relevant part, will be amended to read:

> 1. In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

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[38] The amendments in the Guatemala City Protocol were later incorporated in Montreal Protocol No. 3 (which is not expected to be ratified by the Senate). When Montreal Protocol No. 3 was being considered for ratification by the Senate, the Committee on Foreign Relations reported that the re-drafted Article 24 "makes clear that actions for damages whether founded on the 'Convention, or in contract or in tort or otherwise' can only be brought subject to the conditions and limits set out in the Convention." S. Exec. Rep. No. 45, 97th Cong., 1st Sess. 12 (1981); *Accord* S. Exec. Rep. No. 21, 101st Cong. 2d Sess. 15 (1990).

[39] The Solicitor General's Office has advised that the United States is actively considering ratifying Montreal Protocol No. 4, which adopts the Hague Protocol amendments (but not the Guatemala City Protocol amendments). *See* Letter of Seth Waxman, Solicitor General, Counsel of Record for the United States, to the Court dated July 1, 1998.

International Civil Aviation Organization, *2 Documents of the International Conference on Air Law, Montreal*, ICAO Doc. 9154-LC/174-2 at 273 (1975).

Thus, the amended Article 24, if ratified, continues to use the "however founded" language, but deletes "in the cases covered by" in favor of "in the carriage of." Irrespective of whether the Senate ratifies Montreal Protocol No. 4, however, the Protocol cannot "govern the disposition of this case" (*Saks*, 470 U.S. at 403), *i.e.*, whether the Warsaw Convention is exclusive where there is no Article 17 accident or no bodily injury. *See also* ATA *Amicus* Br. at 5 ("The lower court's reasoning misconstrues the scope of the Warsaw Convention, as applied by the courts of this country, and effectively rewrites Article 17.").

Even if the Senate ratifies Montreal Protocol No. 4, the issue on which the Court granted *certiorari* will remain unanswered. The Court has twice declined to address the issue of the exclusivity of the Convention. *See Floyd*, 499 U.S. 530; *Saks*, 470 U.S. 392. If ratified, Montreal Protocol No. 4 will be "a list of amendments to the Warsaw Convention" governing transportation only between those States adhering to the Protocol.[40] *Hyosung (Am.), Inc. v. Japan Air Lines Co.*, 624 F. Supp. 727, 728 (S.D.N.Y. 1985) (addressing the Hague Protocol, to which the United States will adhere upon ratification of Montreal Protocol No. 4). Article 17, however, will not be one of those amendments.

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[40] At this time, 30 of the over 120 signatories of the Warsaw Convention have adopted Montreal Protocol No. 4. If and when the Senate ratifies the Protocol, the United States remains in treaty relations with signatories to the unamended Convention, whether or not those countries adopt Montreal Protocol No. 4. Similarly, the United States will also remain in treaty relations with other signatories which adhere to the Convention as amended by Hague, but not Montreal Protocol No. 4. The common denominator among all signatory States, however, is the Warsaw Convention. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1463, 1469 (D.D.C. 1985), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987) (unrelated issue), *aff'd*, 490 U.S. 122 (1989) (same). Thus, the issue of exclusivity remains ripe for resolution by the Court.

Resolution of the exclusivity issue, therefore, affects all international transportation by air irrespective of whether courts are applying the unamended Warsaw Convention or Montreal Protocol No. 4. The Court should answer the exclusivity question presented in light of the Convention's expressed goals of uniformity *and* certainty. The Court should declare that the Warsaw Convention, whether unamended or amended pursuant to Montreal Protocol No. 4, provides the exclusive cause of action.

C. The Court Should Find The *Abnett* Decision By The Court Of Last Resort Of A Sister Signatory Persuasive

In *Abnett v. British Airways plc*, ([1997] 1 All E.R. 193 (H.L. 1996) (U.K.)), the House of Lords of the United Kingdom, a sister signatory to the Warsaw Convention, resolved the immediate issue before the Court. The House of Lords, finding the Warsaw Convention exclusive for actions brought in the United Kingdom of Great Britain and Northern Ireland, concluded that "where the Convention has not provided a remedy, no remedy is available." (Pet. App. 65a). Employing the tools of treaty interpretation, the House of Lords held that "in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise . . . ." (Pet. App. 55a).

Considering the "whole purpose" of Article 17, the Court concluded that the Warsaw Convention is to "prescribe the circumstances—that is to say, the only circumstances—in which a carrier will be liable in damages to the passenger for claims arising out of his international carriage by air." (Pet. App 55a).

> To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole

> system, even in cases for which the Convention did not create any liability on the part of the carrier.

Id.

Placing the provisions in their historical context, the Court noted that Article 23 nullifies "[a]ny provision tending to relieve the carrier of liability," a generally accepted practice in the 1920's, a time when the Convention was in its genesis. (Pet. App. 54a); *see supra* at 18 n19. As noted by the House of Lords:

> To surrender freedom of contract on this issue was an important concession on the part of carriers, which made sense only in the context of the entire set of rules by which their conduct was to be regulated.
>
> The counterpart of what was plainly a compromise is to be found in . . . Article 24. This Article provides that in the cases covered by . . . Article 17 . . . "any action of damages, however founded, can only be brought subject to the conditions and limits set" by the Convention.

Id.

The compromise made was that the carrier surrendered its freedom to exclude or limit liability, but the passenger would be restricted to bringing an action for damages solely under the conditions and limits of the Convention.[41] Thus, based on the text of the Convention and its intended purpose, the House of Lords decreed that the Convention was intended to be uniform and exclusive of any resort to domestic law. As stated in *Abnett*:

> The idea that an action for damages may be brought by a passenger against the carrier outside the convention in

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[41] Article 25 is the result of another "compromise" by the delegates, which precludes the carrier from availing itself of the liability limits of Article 22 if there is "wilful misconduct" on the part of the carrier.

> the cases covered by article 17—which is the issue in the present case—seems to be entirely contrary to ~~the~~ system which these two articles [17 and 24] were designed to create.

Id.

The House of Lords concluded that the Warsaw Convention "was not designed" to provide a recovery for "all losses." (Pet. App. 64a). "It was designed instead to define those situations in which compensation was to be available." *Id.* Tseng's situation is one for which no compensation is available.

CONCLUSION

While courts do not want to deprive any passenger of a right of recovery, this treaty was not intended to provide full recovery for every alleged harm which may occur during international transportation by air. *Floyd*, 499 U.S. at 544-45. The expressed need for uniformity on the subject of carrier liability in international air transportation is frustrated when courts permit recovery outside the Convention, particularly with respect to an issue as integral to air transport as security. The Court should hold that neither EL AL nor any other carrier may be subject to over fifty distinct causes of action for a security search, such as was conducted by EL AL in this case.

The judiciary must uphold the terms and conditions of a treaty. Because the Warsaw Convention exclusively governs Tseng's personal injury claim against EL AL and because her claim fails to meet the conditions precedent to recovery under Article 17, the Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

vs.

TSUI YUAN TSENG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT'S COUNTER-STATEMENT OF THE NATURE OF THE CASE

Respondent, a New York citizen, was a clinical nutritionist employed at a medical center for 22 years (A50-2)*. Looking to vacation in Israel (A52-3), she had booked passage on the May 22nd, 1993, EL AL flight 008, New York to Tel Aviv, departing JFK International Airport in New York City, where petitioner maintained and operated terminal facilities for passengers. (JA19-20)**

Respondent appeared at petitioner's JFK Terminal on the scheduled date for her vacation flight. She presented her ticket and American passport, was interviewed and escorted into a small room by a uniformed male EL AL employee. She was confined in the room for more than an hour before being released and allowed to board the plane. (JA19-20)(A54-58,63).

Imprisonment was conceded. EL AL's Proposed Finding #3 (JA 23): [1]

> Plaintiff was not free to leave the area where she was interviewed unless she declined to board EL AL flight 008.

She was never given the option. The reason for detaining respondent was never explained unless it was to add to pressure on her to submit to what was to follow.

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* "A" references are to Court of Appeals Joint Appendix. This material has been lodged with the Clerk of the Court.

** "JA" references are to Supreme Court Joint Appendix.

1. The very assertion by defendant of the Proposed Finding constitutes an admission by that party proposing it. *United States v. Bedford Associates*, 713 F.2d 895, 905 (2d Cir. 1983). It can be used only against, not for, the defendant. *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 633 (2d Cir. 1994).

Confined in the small room and unable to leave, what did follow was that Ms. Tseng was compelled to lower her blue jeans to mid-hip level and expose herself to search by a uniformed female EL AL employee. All parts of her body, from head to toe including her most intimate "private parts" were subjected to hands-on palpation for ten to fifteen minutes. Traumatized and humiliated, petitioner was left feeling raped. (A59-62, 86-87). She had not been given the choice to consent or not consent to the search, to forego it, abandon the flight and freely leave the terminal and go home, her body untouched.[2] She should have been. *See People v. Kuhn*, 33 N.Y. 2d 203, 210, 351 N.Y.S. 2d 649, 654, 306 N.E. 2d 777, 780 (1973).[3] Petitioner's characterization of Ms. Tseng's response to this treatment in its "Nature of the Case" as not "object[ing] to the search" should not connote that she consented to it. She was given no choice. She was made to feel imprisoned, was ordered about by EL AL's uniformed security personnel and cowed and intimidated into submission by their display of power. (A61).

> Q. How did you feel while you were undergoing this sort of thing?
>
> A. I was really furious, and I felt that I was like in that little room, I was like raped.
>
> Q. Why didn't you just get up and walk out?
>
> A. I felt like I was a prisoner in that little room. I didn't have freedom to leave that room.
>
> Q. Did they tell you could leave?

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2. The District Court below, *Tseng v. El Al Israel Airlines, Ltd.*, 919 F. Supp. 155, 158 (1996) noted that EL AL failed to define a reason for subjecting Tseng to the particular treatment she received.

3. *See* footnote 33.

A. No.

Q. Did anybody tell you don't have to be examined, you can leave if you want?

A. No. Nobody tell me that. I was just like locked up in this little room with all the police [sic] there.

Q. When you say there were police, who are you referring to?

A. These people searching me and checking my — taking out my things from my luggage.

Q. Why do you call them police?

A. They look like police. Like secret agent or something.[4]

Consent given under duress is ineffective. *Restatement Torts 2d* § 892B(3). At a trial where the liability issues were explored, Tseng's proof was unchallenged. The procedures followed were admittedly standard for EL AL. (A113, 118)

SUMMARY OF RESPONDENT'S ARGUMENT

1. It is impermissibly absurd and strains interpretative reasoning beyond the breaking point to read into the very Convention which subjects airlines to strict liability for accidental bodily injuries an unspoken grant to airlines of freedom to imprison, assault and batter their passengers, immunizing them from local law requirements that they compensate their victims.

2. The Warsaw Convention [5] should not be construed to bar passenger actions against airlines for injuries due to willful tort, including assault and battery and false imprisonment.

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4. Her impression that the security personnel were police was not far-fetched. They are similar, at least, to "law enforcement officers". 14 C.F.R. § 129.25(h)(1).

5. "Convention for the Unification of Certain Rules Relating to International (Cont'd)

3. Where a passenger is injured within a state as a result of an airline's nonaccidental willful torts under state law, *viz* assault and battery and false imprisonment, the airline's liability is based on the state law ordinarily applicable to private persons. The Warsaw Convention does not exclude airlines from generally applicable local tort law subjecting willful tortfeasors to the requirement that they be held in damages to their victims.

4. An unexpressed preemption of the state tort law of civil liability for assault and battery and false imprisonment and other willful torts should not be read into the Warsaw Convention.

5. The Convention neither adopted any uniform rule of its own nor authorized national courts to pursue uniformity in derogation of otherwise applicable law, and Articles 17 and 24(2) of the Convention permit damages for legally cognizable harm resulting from willful wrongdoing. They leave specification of such harm to the domestic law applicable under the forum's choice-of-law rules. *Zicherman v. Korean Air Lines Co., Ltd.* 516 U.S. 217 (1996).

(Cont'd)
Transportation by Air", Concluded at Warsaw October 12, 1929, and Entered into Force for the United States October 29, 1934. 49 Stat. 3000 (Text codified and appended to 40 U.S.C. § 40105).

ARGUMENT FOR RESPONDENT

I. IT IS AN ANOMALOUS AND IMPERMISSIBLE ABSURDITY TO CONCLUDE ON THE BASIS OF THE CONVENTION'S IMPOSITION OF LIABILITY ON AIRLINES FOR ACCIDENTAL BODILY INJURIES A WARRANT FOR THEM TO IMPRISON, ASSAULT AND BATTER THEIR PASSENGERS ON STATE TERRITORY FREE OF THE CIVIL ACCOUNTABILITY TORTFEASORS OWE TO THEIR VICTIMS UNDER STATE LAW.

As applied, the *Question Presented for Review* boils down to whether Article 17 of the Warsaw Convention imposing strict liability on airlines for accidental bodily injuries to their passengers licenses them to imprison, assault and batter their passengers with impunity contrary to state tort law. EL AL depends on a grotesque and indefensible "Yes" answer to that question. In its brief (p. 38), it makes that clear:

> *The unamended Warsaw Convention limits carrier liability exclusively to injuries caused by "accidents" . . . ; carriers are not liable for "events' " other than "accidents' and there is no right of recourse to national law."*

Article 17 subjects airlines to strict liability[6] for accidental bodily injuries. At bar, under the accepted common law principles to which New York adheres, petitioner's conduct amounted to assault and battery and false imprisonment, classically intentional wrongs where committed.[7] The *Question* presented for review by

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6. *Air France v. Saks*, 470 U.S. 392, 404 (1985).

7. A. **False imprisonment**: *Broughton v. State of New York*, 37 N.Y. 2d 451, 373 N.Y.S. 2d 87 (1975), *cert. den. sub nom., Schanbarger v. Kellogg*, 423 U.S. 929, 96 S. Ct. 277 (1975); *Holt v. State of New York*, 29 N.Y. 2d 573 (Cont'd)

the petition on which *certiorari* was granted correctly assumes the event here was no Article 17 accident. Petitioner would have Article 17 reach over and preclude recovery for a passenger's injuries resulting from such intentional wrongs simply because they did not occur accidentally. It would leave its victim stripped of rights. *Its* Convention would endow it with free reign to injure passengers by willful tort with impunity and utter abandon. As applied, a "Yes" to the *Question Presented for Review* would have that result.

Petitioner's *amicus International Air Transport Association* (IATA) adopts El Al's view of The Convention with its incongruous consequences. It criticizes the Second Circuit's decision in its brief (IATABr) because,

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(Cont'd)

(1971); *Scholl v. City of Utica*, 163 A.D. 2d 909, 559 N.Y.S. 2d 827 (1990) **Note i:** Intent to harm is not an essential element of the tort (*Holt*) but intent to confine is (*Broughton*). **Note ii:** Lack of consent to confinement is a linchpin to liability (*Broughton*). B. **Assault and battery**: *Schloendorff v. The Society of the New York Hospital* (*per* Cardozo, J.) 211 N.Y. 125, 105 N.E. 92 (1914); *Jones v. State of New York*, 33 N.Y. 2d 275, 352 N.Y.S. 2d 169 (1973); *Maines v. Cronomer Val. Fire Dept.*, 50 N.Y. 2d 535, 429 N.Y.S. 2d 622 (1980); *Sphere Drake Insurance Company v. 72 Centre Avenue Corp.*, 238 A.D. 2d 574, 657 N.Y.S. 2d 65 (1997) ("intrinsically intentional act of assault"); *Smith v. The Limited*, 237 A.D. 2d 345, 655 N.Y.S. 2d 418 (1997); *Villanueva v. Comparetto*, 180 A.D. 2d 627, 580 N.Y.S. 2d 30 (1992); *Laurie Marie M. v. Jeffrey T.M.*, 159 A.D. 2d 52, 559 N.Y.S. 2d 336 (1990); *Rubino v. Ramos*, 226 A.D. 2d 912, 641 N.Y.S. 2d 409 (1996); *Locke v. North Gateway Restaurant, Inc.*, 233 A.D. 2d 578, 649 N.Y.S. 2d 539 (1996); *Staudacher v. City of Buffalo*, 155 A.D. 2d 956, 547 N.Y.S. 2d 770 (1989); *Oates v. New York Hospital*, 131 A.D. 2d 368, 517 N.Y.S. 2d 6 (1987); *Jones v. State of New York*, 96 A.D. 2d 105, 468 N.Y.S. 2d 223 (1983); *Noschese v. City of New York*, 53 A.D. 2d 566, 384 N.Y.S. 2d 822 (1976); *Budgar v. State of New York*, 98 Misc. 2d 588, 414 N.Y.S. 2d 463 (1979); *Masters v. Becker*, 22 A.D. 2d 118, 120, 254 N.Y.S. 2d 633 (1964); *United National Insurance Co. v. Waterfront New York Realty Corporation*, 994 F.2d 105 (2d Cir 1993). **Note iii:** Intent to harm is not a necessary element of the tort (*Schloendorff, Maines, Villanueva, Oates, Masters*), though intent to make contact is (*Villanueva, Masters,*). **Note iv:** Lack of consent to harmful touching is a linchpin to liability. (*Schloendorff*).

> if affirmed, it would create [*sic*] liability in the absence of both the accident — *i.e.*, "an unexpected or unusual *event* or *happening* that is external to the passenger, *Air France v. Saks*, 470 U.S. 530, 535-36 (1991) (emphasis added [by IATA]) — and the physical injury prerequisites to recovery under Article 17 . . . (IATA Br, 4)

Hence, the argument runs, if the injury is not accidentally caused but the effect of intentional tort, a prerequisite to recovery under Article 17 has not been met and the intentional tortfeasor is safe home and free of any obligations to its victim. Such is the logic of petitioner's case.

Petitioner deduces this odd freedom to commit intentional tort against passengers from Article 17's strict liability coverage of accidents and its omission to refer to intended misconduct. Deriving a free pass from the treaty for EL AL to commit tort against passengers so long as carried out intentionally and not accidentally is *reductio ad absurdum*. It stretches the canons of interpretation beyond the breaking point. Treaty constructions which "create an absurd anomaly" as does petitioner's cannot stand. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 179-80 (1993) (involving a U.N. Convention Relating to the Status of Refugees). To read into the same Convention which opens wide the courtroom doors to victims of accidental happenstance a mandate to slam the doors shut against victims of intentional wrongdoing is to implant into the body of the Convention "an absurd anomaly".

Implausibility alone has been held an important factor in rejecting a defendant's proposed interpretation of a statute which would effectively have denied plaintiffs state law protection from injuries caused by defective products *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996). Implausibility also played its role in the Court's rejection of an argument as to the "shared expectations of the contracting parties" related to the Warsaw Convention itself. *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. at 223 (1996); *also Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, at 128 (1989).

The law does not "lag behind common sense." *Ludecke v. Watkins*, 335 U.S. 160, 166-167 (1948). As the strained construction of the treaty urged by petitioner is implausible and preposterous, *ergo* it is impermissible. It is at odds with the principle which, by analogy, eschews absurd and irrational statutory interpretations. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *United States v. One Parcel of Real Estate*, 41 F.3d 1448, 1452 (11th Cir. 1995). The same teaching applies to construction of treaties ratified by the Senate (*see Toop v. Ulysses Land Company*, 237 U.S. 580, 35 S. Ct. 739 (1915)), not excluding the Warsaw Convention.

A treaty's interpretation takes into account its "nature [as] a contract between nations" and that " 'general rules of construction apply.' " *Societe Nationale Industrialle Aerospatiale v. United States District Court*, 482 U.S. 522, 533 (1987), citing *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984). *Ritter v. Mutual Life Ins. Co.*, 169 U.S. 139, 156 (1898) states one of those rules:

> One rule of [contract] interpretation is that we must never attribute an absurd intent if a sensible one can be extracted from the writing.

Trans World v. Franklin Mint involved construction of the Warsaw Convention. It was trenchantly noted by Stevens, J. (dissenting op., 466 US, at 262):

> As with any written document, there "is a strong presumption that the literal meaning is the true one, especially as against a construction that is not an interpretation but perversion."

More recently to the same effect was *Chan v. Korean Air Lines*, 490 U.S. at 130, rejecting a desired interpretation of the Warsaw Convention which "produces absurd results."

The adverse public policy implications of reading a treaty ratified by the Senate to cloak airlines with freedom to assault and

batter and falsely imprison their passengers without incurring civil liability need not be belabored. The Convention drafters did not envision that air carriers would commit such willful torts against their passengers. But if an airline should transgress, they surely did not think to award the willful tortfeasor with immunity from civil liability. If the roguish thought entered any minds, it went no further. Treaties as other laws should be accorded a "sensible" construction (*Geofroy v. Riggs*, 133 U.S. 258, 270 (1890)), which petitioner's is not.

Petitioner's proposed construction is not an interpretation but a bizarre perversion. The Second Circuit below pointed to the absurdity in petitioner's reading of the Convention:

> Such a reading would lead to the absurd result of allowing carriers to escape liability for their negligence — or even their intentional torts — so long as the event giving rise to the injury was not an accident
> * * *

(*Tseng v. EL AL Israel Airlines*, 122 F.3d 99, 106).

Attempting to sidestep the absurdity of petitioner's treaty construction, petitioner's *amicus Air Transport Association of America* (ATA) in its *amicus* brief in support of petitioner (ATA Br.) at p. 22, argues that conducting a security search in an intentionally tortious manner "is certainly unexpected by the passenger and unusual for the airline" and "would thus be an 'accident' covered by the Convention and the airline would be liable."

Except for the concession that the airline's intentionally tortious acts are certainly unexpected by the passenger, true of most willful tort victims, this is baseless. The airline, as the district court found, deliberately conducted the search of Ms. Tseng in the manner prescribed by its own procedures. (*n. 8, post; also Argument II below*). The conduct which it planned and carried out was neither unexpected nor unusual to it and no "accident".

A state citizen should be entitled to the protection of state willful tort laws when falling victim to such wrongs on state territory. The Convention says nothing about the subject, save in Article 25 which specifically respects such laws. It should not lightly be construed to deny them that protection.[8]

Petitioner, referring to the Convention's drafting history in its brief, candidly notes that "The Warsaw Convention minutes are probably 'more notable' for their lack of discussion regarding preemption" and that "the one and only comment expressly relating to the preemptive language of Article 24 was by the British Delegate." (Petitioner's Brief (Pet Br.) 35). Not even that lone British comment argues a broadening of the Article 17 term, "accident", the subject of Article 24(2)'s preemptive provisions for personal injury claims, to preempt an air carrier's willful wrongdoing. This hardly demonstrates a consensus among delegates that the language of Article 24 carries preemption beyond Article 17 accidents into the area of intentional tort.

Neither petitioner nor any of its *amici*, all of which purported extensively to review the relevant Convention drafting history, could document the least desire among those who formulated the Convention and who later applied it that air carriers were to be protected from civil responsibility for wrongs they intentionally commit against passengers or to preempt local laws that provided remedies for such willful wrongs. IATA elaborates on "Intercarrier Agreements" and "Agreements on Measures to Implement" the same (IATABr 16-18). Admittedly they are confined on their face to injuries "within the meaning of Article 17", namely accidental injuries. Appendix D to IATABr demonstrates that petitioner EL

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8. Note *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236 (1940), for the respect accorded to state common law rights by this Court, and *Silkwood v. Kerr-McGee Corp.* 464 U.S. 238, 251 (1984) for this Court's denial of non-expressed federal preemption of state common law protection afforded persons on state territory. Also see discussion of unexpressed preemption of state law under Argument VI, post, and of Article 25 under Argument VIII, *post.*

AL ISRAEL AIRLINES was not a signatory to such agreements, whatever effect they might conceivably have had on respondent's cause of action which had already accrued some years earlier. As for the incompleted "modernization" of the Convention (IATABr, 18-20), that is a task for the parties to the Convention, not the Court on this appeal which calls for a ruling on the state of the law at the time of the occurrence some five years ago, and not as it may be if "modernization" takes place in the future. The Court can only inform, not hamper, that modernization process.

II. PETITIONER'S CONDUCT WAS NOT ACCIDENTAL AND THIS ELIMINATES ARTICLE 17 AS A FACTOR IN THIS CASE.

A consent to search is not deemed voluntary in New York when one bows to a display of authority.[9] Respondent succumbed to a display of uniformed police-like authority on the part of petitioner. She did not consent.

Horrifying as the experience was to respondent, petitioner's conduct was not accidental to it as it must be to invoke Article 17 with its exclusion of passenger recourse for non-bodily injuries. It was an intentional carrying out of company policy (A113, 118), rather than an "unintended and unexpected occurrence which produces hurt or loss" or "unexpected or unusual event" or "unforeseen event" or a "fortuitous, unexpected, unusual, or unintended event" within definitions of "*accident*" as used in Article 17 *per Air France v. Saks*, 470 U.S. 92, 398-400 (1985).[10] The

9. *People v. Cameron*, 48 A.D. 2d 783, 369 N.Y.S. 2d 418 (1975).

10. . . . the drafters of the Convention understood the word "accident" to mean something different than the word "occurrence" . . . the text of Article 17 refers to an accident which caused the passenger's injury, and not to an accident which is the passenger's injury. In the light of the many senses in which the word "accident" can be used, this distinction is

(Cont'd)

district court found that "The actual techniques for carrying out the search were prescribed by El Al's procedures".[11] Following its own procedures was clearly not unintended, fortuitous, unexpected, unusual or unforeseen for EL AL. It intended, foresaw and expected what it had designed. True, Tseng did not expect it. Innocent victims of willful wrong rarely do. Tseng's innocence of EL AL's designs does not convert an intentional wrong involving *scienter* into a happenstance.

Petitioner and its *amici* have waffled on whether respondent was injured by an accident. Petitioner and *Amici* US and ATA try to straddle the fence. Petitioner's IATA *amicus* contends for no accident.

Petitioner itself had urged it was below. It then argued the treatment accorded respondent was accidental and within the

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(Cont'd)

> significant. . . . The word "accident" is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. . . . In Article 17, the drafters of the Warsaw Convention. . . specified that air carriers would be liable if the accident caused the passenger's injury. . . the French legal meaning of the term "accident" differs little from the meaning of the term in . . . the United States. . . . The text of the Convention consequently suggests that the passenger's injury must be caused by an unexpected or unusual event. *Zicherman* later added this meant "an unforeseen event".

516 U.S. at 223.

11. *Tseng v. El Al Israel Airlines, Ltd.*, 919 F. Supp. 155, 158 (1996).

In its *post Tseng* decision, *Fishman v. Delta Air Lines*, 132 F.3d 138 (1998), at 142, the Second Circuit, recalling the record at bar which had recently been before it, observed: "the particular search conducted by the defendant in *Tseng* was called for by the airline's normal, everyday procedure, and did not deviate from it."

limitation to accidental "bodily injury" of Article 17. Excluded from Article 17 rights are claims for accident-caused traumatic stress or psychic injury (*Eastern Airlines v. Floyd*, 499 U.S. 530 (1991), and this was the reason for petitioner's lower court argument. But the cause in *Floyd* was brought under Article 17. It differs from the instant action for intentional wrong based not on Article 17 but on state tort law.[12]

But as the case moved into this Court, in petitioning for *certiorari*, petitioner appeared to depart fundamentally from its original position. It refrained from arguing that the crucial event was an accident. Its omission to make that contention in its petition was noted and approved by *Amicus* US (*see Amicus* US brief "Supporting Petitioner" (SG #2) at p. 18). This concession had been noted and approved at the start by *Amicus* US in its original brief. (SG #1, 11) [13] But now petitioner casts hints and suggestions in note 17 of its brief that it might be interpreted to be one, contrary to the plain English (and French) meaning of "accident" in Article

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12. Unlike the case at bar, founded exclusively on state-law tort, the plaintiffs in ***Floyd*** asserted "two state-law tort claims, a state-law claim for breach of contract, and a claim for recovery under the Warsaw Convention." The case came to this Court solely on the Convention cause, the state-law claims having already been dismissed below on Florida state-law grounds. (***In re Eastern Airlines, Inc., Engine Failure, Miami Int'l Airport***, 629 F. Supp. 307 (S.D. Fla. 1986)). ***Floyd*** expressly "address[ed] only the theory of recovery claimed under the Warsaw Convention." 499 U.S. 534 (n.2) No such theory is advanced here. Similarly, in ***MacDonald v. Air Canada***, 439 F.2d 1402 (1st Cir. 1991), cited in ***Tseng*** as holding that the finding of an "accident" under Article 17 is a prerequisite to liability to a passenger, the state law negligence causes were first dismissed for insufficient evidence and the dismissal for no proof of "accident" was limited to the remaining Article 17 cause of action, a cause not asserted at bar.

13. We believe it would be appropriate for this Court to accept the parties' agreement on that issue: a routine security search that complies with federal standards, as this one apparently did (*see* Pet. App. 41), should not be characterized as an "accident."

17 set forth in *Saks*. It does not contend that it was, but petitioner cagily leaves the matter up in the air.

Without a clearly stated claim that this case evolved from an accident, petitioner has abandoned reliance on Art 17. As this Court pointed out in *Floyd*, 499 U.S. at 535-536, the very first condition to Article 17's applicability is that there have been an accident. Shifting to a new tack, petitioner can only be read to urge that for the very reason its tort was *not* accidental within the *Saks* definitions, its very willfulness which makes its acts not accidental immunizes it under the no longer applicable Article 17. It is unlikely that the Warsaw Convention's architects and the ratifying Senate had that in mind.

Article 17's application at bar would be equally absurd, given its plain language and strict liability implications. By the district court's reasoning, the passenger search here with all it entailed was an "accident" because what led to it was a mistaken suspicion of a person with a ticket seeking to board the plane who turned out to be an innocent traveler. It dismissed her case because she was innocent. By that approach, every mistake leading to a search, however honest, would render the search an "accident" and lead straight to Article 17 strict liability in case of ensuing bodily injury. In the court's understated opinion below,

> To suppose the drafters of the Convention aimed to impose close to absolute liability on air carriers for searches that disclosed no danger seems to us highly unlikely.

Tseng v. El Al Israel Airlines, 122 F.3d 99, 103-4 (JA52).

Hoping to escape the accident requirement of Article 17 not met here, EL AL falls back on Article 1 of the Convention for Unification of Certain Rules. Article 1 provides that the Convention shall apply to "all international transportation of persons" by aircraft. Application to "all international transportation of persons" is quite consistent with the limitation of Article 17 to "accidental" injuries.

Petitioner would convert Article 1 from what on its face only outlines the area in which the Convention applies to a provision preempting all other law in that area, even though state law of intentional tort does not conflict with the Convention and even if preemption is not expressed in it. Petitioner would have Article 1 alter the scope of Article 17 from accidents, as it provides, to "passenger injury" however caused,[14] even when by intentional airline wrongdoing. That contorted reading is necessary for petitioner to bring the cause at bar within the coverage of Article 17 and so invoke the exclusivity provisions of Article 24(2). Nothing in Article 1 warrants such a reading.

Amicus IATA similarly refers to "the jurisdictional scope of Article 17" as though mere scope or area of coverage is enough to preempt non-accidental intentional torts when the Convention drafters made no effort to do so. (IATA Br., 12).

Amicus US, in a remarkable display of self-contradiction, after conceding that the precipitating event could not properly be termed an "accident", in the same brief supporting review by this Court and now in its *Amicus* brief supporting petitioner on the merits turns around and makes a last gasp try to salvage the "accident" label anyway. The US goes back and adopts EL AL's original position in the Court of Appeals that the cause arose from an accident and which, with the blessing of US, petitioner did not include in its petition for *certiorari*. At SG #1, 16, fn. 7, undoing its blessing, US argued that

> the definition of "accident" had been "flexibly applied" in this context to include not just inadvertent harms, but reckless and even intentional torts as well, such as "torts committed by terrorists." *Saks*, 470 U.S. at 405.

And now in its second brief (SG #2, 18, fn. 11), US substantially repeats the same contention.

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14. Petitioner ignore *Saks* which sharply distinguished "accident which caused the passenger's injury" referred to in Article 17 from "accident which is the passenger's injury" which is not within the intendment of Article 17.

"Accident" is not an ambiguous term and has not been so flexibly applied. *Amicus* US forgets the teaching of *Saks*, *supra*: a basic characteristic of an Article 17 "accident" is that it be "unintended" by the air carrier.

US "proves" its point with examples which are not "in this context", if that means context of this case. They are of intentional torts inflicted by third persons, not by the air carrier itself. The reference to "torts committed by terrorists" in *Saks* as accidental to airlines does not establish that intentional torts committed by airlines themselves are accidental to airlines. *Saks* is squarely to the contrary. The US's "insurance law" contention ("intentionally inflicted by a third person") is subject to the same infirmity. SG Br. 16, fn. 7[15]

If the intentional wrongs committed by third parties are Art.17 "accidents" subjecting airlines to strict liability, this "expansive scope of the term 'accident'" in no way answers "the Court of Appeals' concern that carriers not escape liability for *their* intentional torts", as US asserts at SG Br. 16, fn. 7. (Emph. added).

While respect is due to the executive's views on treaty interpretation, deference should not be given where those views are unreasonable and illogical.

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15. Under the insurance law, where an assured itself intentionally commits tort, it is not accidental as a matter of law so as to entitle the assured to coverage under an accident policy. *Technicon Electronics Corporation v. American Home Assurance Company*, 74 N.Y. 2d 66 (1989); *e.g. St. Paul Fire and Marine Insurance Company v. Warwick Dyeing Corporation*, 26 F.3d 1195, 1202 (1st Cir. 1994), construing a policy covering property damage resulting from an assured's accidental pollution discharge:

> The courts are practically agreed that the words "accident" and "accidental" mean that which happens by chance or fortuitously, without intention or design, and which is unexpected, unusual and unforeseen.

Aetna Casualty & Surety Co. v. General Dynamics Corp., 968 F.2d 707, 710 (8th Cir. 1992) (quoting *St. Paul Fire & Marine Ins. Co. v. Northern Grain Co.*, 365 F.2d 361, 364 (8th Cir. 1966)). "We think it would strain common sense to find that ACME's disposal of Warwick's waste in a landfill was unexpected or unintended by Warwick [the assured]."

As noted, both petitioner and *Amicus* US (despite its reference to third party terrorists and the insurance law) agree that the event was no *accident*. The original French text of Art.17 uses the word "*l'accident*" for the triggering event.[16] It was no *l'accident* in the original French any more than in the English sense of the word (*see Saks*, *supra*). The same word in each language specifically means what this Court in *Saks* said it meant. If there was any doubt, the later *Zicherman*, 516 U.S. at 223, made it very clear that in *Saks*, it had

> determined that in French legal terminology the word "*accident*" referred to an unforeseen event.

The signatories' delegates who drew up the convention were at no loss for generic French words such as *l'événement* and *la occurrence*, These terms are broad enough to include any event, accidental or intentional, if that is what they intended[17]. They are not specifically limited to accidental events as is *l'accident*, the term the signatories employed in Article 17.[18] The delegates knew the difference. Where *l'événement* was intended, as in Article 18, it was used. Text language in treaty interpretation is not to be brushed

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16. Set forth in 94 Stat. 3005 and in *Air France v. Saks*, 470 U.S. 392, 398 (n.2).

17. *Cassel's French Dictionary* (1962) 7, 324, 416, 520. *Also* Giemulla/ Schmidt, *Warsaw Convention*, Kluwer Law International, The Hague, London, Boston, Suppl., 4 (October 1994), WC Art. 17, p. 10, pointing to the significance of use of the term *accident* rather than the word *l'événement*, a "broader term" meaning "event" which term when intended is used elsewhere in the Convention, *e.g.* Art. 18.

18. As noted by petitioner in its brief (Pet. Br. 37), the treaty signatories were quite sensitive to Art. 17's employment of the term "accident" instead of "event" when at Guatemala City in 1971 their delegates made an effort to substitute "event" for "accident" in Art. 17, failing to make the change effective for lack of a sufficient number of ratifiers.

aside, especially where the text is clear. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. at 134 (1989).[19]

The drafters' use of the French word for accident in Article 17 is not ambiguous. It could not be clearer.

> "[T]o alter, [* * * 21] amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a casus omissus in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops — whatever may be the imperfections or difficulties which it leaves behind. *The Amiable Isabella*, 6 Wheat. 1, 71 (1821)." *Chan v. Korean Air Lines*, 490 U.S., 135.

As this Court pointedly held in *Air France v. Saks*, 470 U.S. 398, by providing for liability to injured passengers due to an "*accident*" in Article 17 and for baggage loss due to an "*occurrence*" in Article 18, word differences meant something.

> This difference in the parallel language of Articles 17 and 18 implies that the drafters of the Convention understood the word "accident" to mean something different than the word "occurrence," for they otherwise logically would have used the same word in each article . . . The language of the Convention accordingly renders suspect the opinion of the Court of Appeals that "accident" means "occurrence."

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19. Also note concurring opinions of Justices Kennedy and Scalia in *United States v. Stuart*, 489 U.S. 653 (1989), at 370 and 371 respectively.

Hence, far from making Article 17 all-embracing to cover *all* personal injuries and employing a term available to them to make it so, the drafters deliberately used a term limited to "unexpected or unusual events", or "unforeseen events" as was held to be the case by this Court in *Saks* and later, *Zicherman*. It is only to those unexpected, unusual, or unforeseen events that Article 17 can be regarded as exclusive.

The Fifth Circuit in *Potter v. Delta Airlines*, 98 F.3d 881, 887 (1996) thought the views of delegates to the Guatemala City International Conference on Air Law in 1971 demonstrated that Article 17's use of the term "accident" was outmoded and that in the eyes of the international community "event" should replace "accident" in Article 17. This is clear error. If it did, Article 24(2) would have preempted the Delta occurrence. In fact, the opposite is demonstrated and in the end the *Potter* court agreed.

Those Guatemala City delegates did express dissatisfaction with the word "accident", with its narrow import in Article 17 and a desire to substitute the broader term "event" for it. *See Air France v. Saks*, 470 U.S. 403-04. They issued the *Guatemala City Protocol of 1971* to incorporate this change, but this failed for lack of ratifiers, including the United States. The *Saks* Court, after taking *Guatemala City* into account, concerned itself with the meaning of "accident", defined it as described and Article 17 remains unchanged. The result of *Guatemala City* serves as an interpretative aid to the Convention. It highlights the signatories' recognition of the difference between "accident" and "event" and speaks to the significance of the continued retention of "accident" and its non-replacement by "event" in Article 17's text.

When it came down to it, the Fifth Circuit accepted this as a fact. If "accident" had become as broad a term as "event" in the context of Article 17, the occurrence resulting in injury to Mrs. Potter on the Delta flight would have been included and covered by Article 17 and expressly have been preempted by Article 24(2). *Potter* recognized it was not that broad. Without preemption

expressed anywhere in the Convention, to find it *Potter* had to imply it. 98 F.3d at 885.

Petitioner's *Amicus* IATA (IATABr, 4) straight off argues that *because* the event was *not* an accident it should be deemed preempted by the Convention.

If the text of Article 17 *per se* were not enough, no evidence that the framers possessed the unlikely intent to embrace intentional tort along with accidents within Art.17 under the term *l'accident* has been culled by petitioner and its supporting *amici* from the drafting history or context to expand the language used beyond its plain meaning.

Accordingly the case at bar arising from an intended event, is not embraced within the scope of Article 17 but belongs outside the Convention and its restrictions.

III. ARTICLE 24(2) PLAYS A DEFINING ROLE BY NOT INCLUDING INTENTIONAL TORT WITHIN THE SCOPE OF THE CONVENTION'S EXCLUSIVITY BUT INSTEAD LIMITING EXCLUSIVITY IN PERSONAL INJURY CASES TO ACCIDENTS COVERED BY ARTICLE 17.

The only reference in the Convention to Article 17 exclusivity appears in Article 24(2). Without exclusivity or preemption under Article 24(2), there is none under the Convention.

Exclusivity is imparted to various portions of the Convention by Article 24. Article 24(1) imparts it to cases covered by Articles 18 (baggage and goods) and 19 (delay), not pertinent here. Whatever exclusivity Article 17 could possibly have had here would be a product of Article 24(2). It furnishes it so long as the case is "covered by article 17". The case at bar is not. As noted, *Eastern Airlines v. Floyd* made clear that the first requisite to coverage by Article 17 is that there have been an "accident" (499 U.S. at 535-36). It is beyond cavil that the occurrence herein was not an accident

and was not "covered by Article 17". Exclusivity of Article 17 in the area of intentional tort is unauthorized by Article 24(2) or any part of the Convention and does not exist. To extend the scope of Convention exclusivity beyond what the Convention provides would require an improper judicial redrafting of Article 24 or Article 17, and this is barred. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. at 135; *Air France v. Saks*, 470 U.S. at 406.

The clause in Article 24(2), "without prejudice" to the "respective rights" of plaintiffs as a further exception to any imputed exclusive effect of Article 17 can only be meaningful if the door is left open to the assertion of "rights" based on other law. The very term "rights" signifies a legal basis. It is a term contained in a clause providing that rights derived not from Article 17 but elsewhere are not within the exclusive provisions of that Article. Local law is left standing as a basis for those other rights by Article 24(2).

Exclusivity leads to preemption of local law. The Convention nowhere expresses preemption if the injury causing occurrence is not an Article 17 "accident". For all its discussion of the exclusivity provisions of Article 24, the Fifth Circuit in *Potter v. Delta Airlines*, 98 F.3d 881 (1996) ended up agreeing they did not apply. *Potter* acknowledged "the Convention has not expressly preempted state law" (*i.e.* by exclusivity of Article 17) and so it implied it. (98 F.3d 885) Petitioner depends upon implanting an unexpressed *implied* preemption of state law into the Convention to uphold its contentions. The Convention does not state that it exclusively governs so as to preclude willful tort liability. And so it does not under *Zicherman*. Petitioner offers no compelling reason why the case at bar should present the occasion to upset this settled law.

The Convention does not purport exclusively to cover the field, but only "certain" parts of it. Far from stating that it is exclusive, the drafters saw to it that the treaty was entitled "Convention for the Unification of Certain Rules Relating to International Transportation by Air". Though their existence was apparently envisioned, rules not "unifi[ed]" by the Convention

were not encompassed in it. As noted in *Tseng* below (122 F.3d 105), the drafting history of the Convention shows that the use of that terminology in its title was not accidental. It was the product of an effort to insure that the Convention not be regarded as all-encompassing, blanketing the field to the exclusion of non-conflicting national laws. Indeed the express limitation of the scope of the Convention to "certain rules" played a critical role in the Convention's adoption.

IV. THE SUPPOSED NEED FOR "UNIFORMITY" IN CONSTRUING THE CONVENTION TO RENDER IT THE EXCLUSIVE SOURCE OF REMEDY AGAINST AIRLINES HAS BEEN REJECTED BY THIS COURT IN FAVOR OF LEAVING SPECIFICATION OF THE HARM LEGALLY COGNIZABLE TO THE DOMESTIC LAW APPLICABLE UNDER THE FORUM'S CHOICE-OF-LAW RULES.

Neither *Abnett v. British Airways PLC* 1 All E.R. 193 (H.L. 12 December, 1996) nor *Potter v. Delta Airlines*, 98 F.3d 881, *supra*, poses a conflict with the Second Circuit in this case. Neither *Abnett* nor *Potter* lends support to EL AL's argument that the Warsaw Convention shields it from common law claims of willful wrongdoing. As for *Abnett*, its effect here, if any, depends at the outset on a comparison of the two cases. *Abnett* did not involve intentional tort. The one at bar does. The opinion by Lord Hope in *Abnett* involved common law passenger claims in negligence and breach of implied contract of reasonable care. It arose from a flight delay in Kuwait exposing the passengers to capture by invading Iraqis. In that non-willful wrongdoing case, Lord Hope ruled that Article 17 was the exclusive remedy for passengers. He rested on a felt need for uniformity in construing the Convention but the doctrine he expounded was not in the context of plain common law willful torts, as at bar.

In pursuit of uniformity, Lord Hope overlooked mention of this Court's landmark *Zicherman* holding which came down almost

a year before (16 January, 1996) and which flatly rejected uniformity as a guiding principle in construing the Convention.

> (516 U.S. 225) The most natural reading of this Article is that, in an action brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for.
>
> (516 U.S., 229) Congress may choose to enact special provisions applicable to Warsaw Convention cases, as some countries have done. *See supra*, at 635. Absent such legislation, however, Articles 17 and 24(2) provide nothing more than a pass-through, authorizing us to apply the law that would govern in the absence of the Warsaw Convention.
>
> * * *
>
> We conclude that Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules.[20]

Thus *Abnett*, calling for "uniformity" as a guide to Convention interpretation, failed to heed its own call but went its own way, establishing a British view unexplainedly differing from the American approach in the earlier *Zicherman*. Signatory states have traditionally applied differing rules in construing various Convention clauses.[21]

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20. Applied by this Court in *Dooley v. Korean Air Lines Co., Ltd.*, 97-704 (decided June 8, 1998) __ U.S. __.

21. *See* extensive signatory state court references throughout *Giemulla/ Schmidt, Warsaw Convention*, Kluwer Law International, The Hague * London * Boston, and Suppls.; *Goldhirsch, The Warsaw Convention Annotated, a Legal Handbook*, Martinus Nijhoff Publishers, Dordrecht/Boston/ London, 1988.

The court below followed *Zicherman's* guidance. It exposed some of the flaws in the *Potter v. Delta Airlines* argument. (98 F.3d 881, 885) *Potter*, like *Abnett* a non-willful tort case, erroneously equated *uniformity* with *exclusiveness* in providing remedies. As it held, the goal of uniformity does not preclude resort to local law when the Convention is not applicable. *Tseng*, 122 F.3d 107 (JA60).

But yet *Potter* does not necessarily conflict with the Second Circuit's *Tseng*. It does not confront the issues at bar. It no more involves a willful tort by an airline than did *Abnett*. In *Potter*, a passenger returning to her seat on a privately owned aircraft caught her foot in a carpet in the aisle as she sought to squeeze into her row past a passenger leaning back and twisted her knee. The court held the unintended occurrence did not fit the meaning of "accident" in Article 17 set by *Air France v. Saks*. (*see* Note 10, *supra*). That left the passenger with state-law negligence claims. *Potter's* broadly stated holding that a requirement of uniformity bars non-accidental occurrence recoveries against airlines was in the context of those claims, not one for willful tort which was not before it.

To the extent that *Potter's* reach be deemed to extend beyond the unintended occurrence case before it, it would take a long stretch to extend it as far as the present case involving *scienter*. Its reasoning is posited upon the dubious assumption, rejected by *Zicherman*, that interpretation of the Warsaw Convention is bound by a requirement of uniformity. *Potter's* rationale for barring negligence claims *via* the *uniformity* route boiled down to:

> Uniformity with respect to liability is required in order to allow airlines to raise the capital needed to expand operations and to provide a definite basis upon which their insurance rates can be calculated.

(98 F.3d 885).

That rationale has no application at bar. It can scarcely be contended that requiring airlines to respond to the applicable state tort law when they assault, batter and falsely imprison passengers

on state soil would be unjust or add so much as a jot to operating costs. On the screen of the economics of the international air transportation industry, such an elusive speck would not appear more boldly than a faint blip, if that.

The Warsaw Convention has long exposed Airlines to state tort law liability in cases of willful misconduct. The Convention's Article 25(1) itself expressly rejects uniformity of law, *i.e.* Convention exclusiveness. No unforeseen new burden, if burden it can be called, would be added by an affirmance. If any there be, it is already there. Article 25(1) directs that the law ordinarily to be applied by the trial court, here the *lex delicti*, must govern in such matters.[22] In so doing, it endorses the effectiveness of applicable local law and subjects airlines to it.

Zicherman, followed by the Second Circuit in *Brink's Limited v. South African Airways*, 93 F.3d 1022 (1996), and *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1 (1996), lately joined by the Eleventh Circuit in *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (1997), expressed the principle followed by the court below that "uniformity" is no magic potion for construing the Convention.[23] Indeed, *Zicherman* expressly disapproved an earlier Second Circuit holding under review which had made a felt need for uniformity key even where Convention rights were asserted.

As noted, petitioner's misplaced reliance upon *Abnett* to overstress the need for uniformity in construing rights of international air travelers is undermined by *Zicherman*.

It was earlier observed by the Second Circuit in *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 37 (1975), *cert. den.*, 429 U.S. 890,

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22. *See* text and further discussion under VIII, *post*.

23. In the wake of *Zicherman*, a district court sitting in Florida has recently ruled that the Warsaw Convention is not exclusive as against state law remedies. *Air Express International, Inc. v. Aerovias de Mexico*, 977 F. Supp. 1191 (W.D. Fla. 1997).

> that the protection of passengers ranks high among the goals which the Warsaw signatories now look to the Convention to serve.
>
> Additionally, the purported goal of worldwide uniformity could not have been paramount in the minds of the framers of Article 17, for they contemplated a case-by-case application by the courts that would, to some extent at least, rely on local law.

For its part, the Convention does not expressly preempt all personal injury law governing passenger suits against airlines. The same Fifth Circuit in *Potter,* upon which petitioner relies for the repudiated principle of uniformity noted this to be the case. (98 F.3d at 885).

Exclusivity is not a feature of the Convention. The term is used by petitioner and its *amici* as a code word to justify an interpretation of the Convention whereby airlines are only exposed to liability for Article 17 "accidents" (*i.e., per Saks*, "unexpected or unusual" events) but shielded from common law liability for injuring passengers by intentional torts. The absurdity of this treaty construction has been discussed above.

The reading of the Convention in *Zicherman* (516 U.S. 229) referred to above is precise in this context:

> Articles 17 and 24(2) provide nothing more than a pass-through, authorizing us to apply the law that would govern in the absence of the Warsaw Convention. There is little doubt what that law is in this case.

Zicherman tellingly disposes of the "exclusivity" contention:

> The Convention unquestionably envisions the application of domestic law.

(516 U.S., 231).

V. CONTRARY TO THE GOVERNING LAW PETITIONER WOULD READ INTO IN THE CONVENTION A BAN ON RECOURSE TO STATE LAW FOR DAMAGES CAUSED BY NON-ACCIDENTAL WILLFUL TORT WHICH THE SIGNATORIES HAD OMITTED.

If Article 24(2) were not regarded as leaving the door open to assertion of rights other than those provided by Article 17, its "without prejudice" phrase would be meaningless, despite the rule that meaning be given to every clause of a treaty. While "the more liberal interpretation" of the Convention clause is ordinarily to be preferred for rights claimed under it (*Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163, 61 S. Ct. 219 (1940); *Geofroy v. Riggs*, 133 U.S. 258, 271-2, 109 S. Ct. 1676 (1890)), there can be no doubt since *Zicherman* that this rule applies here.

Even were there no Article 24(2), petitioner's statement (Petition, p. 9) that "a right of recourse under state law should not be read into Article 17" stands the question on its head. Petitioner does the reading in. It reads into it an unwritten denial of that right. Summed up, a ban on recourse to state law for non-accidental tortiously inflicted injuries is not expressed in the Convention and should not be read into it. No reason has been offered for abandoning the rule against judicial embellishment of treaties by addition of provisions not there. *Chan*, p. 135, *supra*, citing *The Amiable Isabella*, 6 Wheat. 1, 71 (1821).

The Convention became a United States treaty by Senate ratification.

> It is difficult to believe that Congress would, without comment, remove all means of recourse for those injured by illegal conduct.

Silkwood v. Kerr-McGee Corp. 464 U.S. 238, 251 (1984).

The Second Circuit carefully reviewed the history and language of the Warsaw Convention and properly concluded that

the reading sought by petitioner was unfounded: (122 F.3d 106-7 Pet. p. 20a).

> Given the self-described limitation of the Convention, it seems illogical to extend its scope beyond that for which it explicitly provides. It is not tenable to believe the Convention meant to address the more ordinary type of personal injury without some express statement in the text to that effect. Such a reading would lead to the absurd result of allowing carriers to escape liability for their negligence — or even their intentional torts so long as the event giving rise to the injury was not an accident occurring on an airplane or in the course of embarking or disembarking as narrowly circumscribed by the definition of Article 17's meaning.

With the Convention silent on the matter, New York's public policy as recently reaffirmed by its highest court to reduce rather than increase the obstacles to recovery of damages, whether defendant is a private person or a public body, and that "[l]iability is the rule, immunity the exception", should be applied with the rest of its law. *Brown v. State of New York*, 89 N.Y. 2d 172, 180 (1996). The public policy of New York is in tune with that long ago laid down for treaty construction by this Court in *Bacardi Corp of America v. Domenech*, 311 U.S. 150, 163 (1940); *Geofroy v. Riggs*, 133 U.S. 258, 271-2 (1890) (*see post*).

New York State's common law of assault and battery and false imprisonment is of general applicability. Realistically its application can have no burdening effect on international air transportation. Protection of the airline industry from such causes of action was hardly in the minds of the drafters and ratifiers of the Convention whose silence on the subject of intentional airline tort in the text was eloquent in expressing what was *not* within their shared expectations.[24] No unreasonable hardship will be imposed on an

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24. Except for Article 25, discussed *infra*.

air carrier if made to respond in damages to passengers it injures by willful wrong in the same way as other tortfeasors. Nothing in the Convention carves out a special exemption of airlines from the several laws of general application of the signatories which entitle victims of willful tort in their territories to redress, or indicates that the signatories intended to abandon the protection afforded by their own several tort laws to the public in such circumstances.

If the Convention was indeed intended as the exclusive vehicle for maintaining a cause for willful wrongdoing, Article 25 would permit the action despite any limitations or exclusions found elsewhere in the Convention. *See* discussion under VII, *post*.

Amicus US contends that Article 25 "is not at issue in this case", on two grounds. (SG #1, 12,13) (SG #2, 18 fn. 10) The first was that the district court found, "as a factual matter, that petitioner's actions were not willful," and that "In the court of appeals respondent did not squarely challenge that factual finding as clearly erroneous". US concedes that respondent did indeed invoke Article 25, arguing "principally that the kind of torts here are 'willful' as a categorical matter and that anything 'willful' cannot qualify as an 'accident' under Article 17."

The first ground is groundless. The district court ruled:

> Accordingly, I find that it was not such wilful misconduct as might take the case outside the Convention's limitations of liability under Article 25.

(JA 31).

This was not a finding of fact. It was merely the district court's legal conclusion that "it was not *such* wilful misconduct as might take the case outside . . . Article 25."

Respondent preserved its argument in the court of appeals that the district court erred in that legal conclusion. The Second Circuit rejected petitioner's Article 25 argument, not because of a

district court "factual finding that petitioner's actions were not 'wilful' " which respondent did not attack, but for very different reasons discussed below in Argument VII.

As a second ground, *Amicus* US asserts that respondent "has not preserved any argument that Article 25 affects the exclusivity analysis in this case", not having cited Article 25 by name in her brief in opposition to the petition (conceding that respondent's brief continued to "characterize petitioner's conduct as 'willful' " (SG #1, at 13)), that being the substance of Article 25. She did so some eight times. For good measure she used the synonymous characterization of that conduct, "intentional", yet four additional times.

Amicus US cites this Court's Rule 15.2 for its "not preserved" contention. Rule 15.2 refers to the obligation of respondent's counsel to point out perceived misstatements in the petition in the opposing brief, and not later. No misstatement regarding Article 25 was perceived in the petition, which does not so much as advert to it. Rule 15.2 further provides that "Any objection to consideration of a question presented based on what occurred in the proceedings below . . . may be deemed waived unless called to the Court's attention in the brief in opposition." Respondent's *Counter-Statement (1) of the Questions Presented for Review* in her brief in opposition to *certiorari* called the Court's attention to her objection to consideration of the first Question as petitioner presented it. No more specific objection, if indeed any was needed, should be required to preserve the Article 25 contention.

Amicus US concluded that "Article 25 presents no obstacle to this Court's review of the exclusivity issue presented here." But now that review has been granted, Article 25 stands as an obstacle to petitioner's prevailing on the merits.

VI. PREEMPTION OF THE STATES' COMMON LAW OF PERSONAL INJURY TORTS IS DISFAVORED AND CONTRARY TO THE PRESUMPTION AGAINST IT.

The *Question Presented* effectively calls for a ruling whether the Convention preempts the state common law on which respondent predicated her causes of action. There remains a strong principled presumption against preemption of state common law in the area of personal injury torts. Though there are none here, even legislatively expressed preemptive clauses are presumed inapplicable.

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996), dealt with an argued preemption of state common law personal injury claims by a federal statute. Unlike the Convention here, that statute did contain specific preemptive language. The Court noted:

(p. 475)

> Throughout our history the several states have exercised their police powers to protect the health and safety of their citizens. Because these are "primarily and historically", . . . matters of local concern, [. . .] the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." [. . .] * * *

(p. 484-85)

> As in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 [. . .], we are presented with the task of interpreting a statutory provision that expressly pre-empts state law. * * *
>
> * * * because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes

> of action. In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," [. . .] we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." * * * we used a "presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express command in Cipollone [. . .]. That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.
>
> (p. 487)
>
> * * * It is, to say the least, "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.

Silkwood v. Kerr-McGee Corp, 464 U.S. 238, 251 (1984).

Also note *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 654 (1995), to similar effect.

Where this Court has found implied preemption, certain criteria were first met. These were laid out in *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 98 (1992): (1) If "field preemption", where the scheme of the putative preemptor's regulation is so pervasive as to leave no room for local law to supplement it; (2) if "conflict preemption", where compliance with both the putative preemptor's and local regulations is a physical impossibility; and (3) where local law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the putative preemptor's. The principles should be as applicable to treaty preemption as to statutes'.

None of these applies to justify an implied preemption by the Convention and the ratifying Senate of a state's common law torts of assault and battery and false imprisonment. The scheme of the Convention is not so pervasive as to embody a remedy for those willful torts and occupy the field. It lacks any remedy and willful airline torts are not within its scope. Nor is there such (or any) inconsistency between common law willful tort law and the Convention as to make compliance with both a "physical impossibility". The "full purposes and objectives" of the signatory states will not be affronted by allowing passengers a right of civil redress for intentional wrongs committed against them.

If preemption were to be applied here, it could be necessary to hold that while a state law affecting the rights of passengers injured as a result of accidents in international flights may be preempted by Article 17, the preemptive effect is so broad as to extend to non-accidents, here to assault, battery and false imprisonment. This was rejected below for good reason stated. *Tseng*, 122 F.3d 107-108 (JA59).

VII. ARTICLE 25 EXPRESSLY LEAVES AIRLINES EXPOSED TO LIABILITY FOR WILLFUL WRONGDOING AND MANDATES LOCAL LAW AS THE LAW OF CHOICE FOR WILLFUL AIRLINE TORT.

Of all the provisions of the Convention, Article 25 alone expressly focuses on willful tort.[25] It excludes such misconduct

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25. Article 25:

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct. (2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

from the scope of any exclusions or limitations to be found anywhere else in the treaty. It serves an important goal of the Convention to deter carriers from willful misconduct. In furtherance of that purpose, Article 25(1) not only rejects any possibility of Convention exclusivity and preemption of local willful tort law but commands that law's application.[26] Both Article 25(1) and (2) exactly cover the facts and applicable law herein. A "Yes" answer to the *Question Presented* so as to exclude respondent's right to sue in this case is barred by Article 25.

To comb the Warsaw Convention for text supporting an implied airline immunity from willful tort claims for personal injuries is to comb in vain. The opposite is true when searching for exposure to such claims. Article 25 contains a willful tort exception for all liability exclusions, including the exclusion from liability for psychic as distinguished from bodily injuries found in Article 17. It leaves airlines exposed to liability for the same. Willfulness is expressly determinable under choice of law principles ordinarily applied, here the *lex loci delicti*.

The application of state law to liability for damages to passengers for willful wrongdoing committed by the airline in New York State is mandated by the Convention itself. For that was "the law of the court to which the case [was] submitted."

It is uncontested that petitioner's employees who treated with respondent at JFK were doing its work. Petitioner stands in their shoes. Their deliberate deeds were its deliberate deeds. They had carried out the functions and procedures it prescribed for them, rendering it liable when those deeds were tortious. Article 25(2).

It is true that the Second Circuit disagreed with the application of Article 25 to this case of willful tort. While holding that intentionally designed acts are not to be subsumed within the scope

---

26. *See* Goldhirsch, *The Warsaw Convention Annotated, a Legal Handbook*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1988, at p. 122.

of the Article 17 "accidents", meaning unexpected, unusual or unforeseen events, the court, comparing Arts. 17 and 25, held that the two were not mutually exclusive and that "Article 25 simply described a subset of 'accidents' that are more egregious and to which a greater degree of culpability attaches." *Tseng*, 122 F.3d 104 (JA52).

Overlooked however was that the two Articles are listed separately and equally. The discrete placement by the drafters of substantive matters into separate equal Articles in the Convention is of dispositive significance for interpretative purposes. *Air France v. Saks*, 470 U.S. 392, 407 (1985) (followed by the Eleventh Circuit in *Krys v. Lufthansa*, *supra*, 119 F.3d 1515, 1522 (1997)).

"The 'accident' requirement of Article 17" (*Saks*) is separately stated and distinct from the "wilful misconduct" provisions of Article 25. Only Article 25 involves *scienter* — willfulness — for an injury producing act. Nowhere in the Convention is it stated that an Article resting on *scienter* is a "subset" of another Article in which the keynote is "accident" — or lack of *scienter*. Just as the Court in *Saks*, at pp. 397 and 398, noted the significance of the difference between "accident" in Article 17 and "occurrence" (in the original French, *"l'événement"*) in Article 18, the same reasoning points up the meaningfulness of difference between Article 17's "accident" and Article 25's "wilful misconduct".

Not only is Article 25's "wilful misconduct" more egregious than Article 17's "accident". "Wilful misconduct" cannot be "accidental", as the Second Circuit pointed out and petitioner has not disputed.[27]

---

27. New York law is in accord. *Locke v. North Gateway Restaurant, Inc.*, 233 A.D.2 d 578,579, 649 N.Y.S. 2d 539 (1996). Since by Art. 25(1), willful misconduct is determinable by New York law (being the law of the court to which the case is submitted), and as assault and battery and wrongful arrest are within that category, those torts do not fall within New York's "commonsense" meaning of *accident* (a " 'sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact' " occurrence) (*Matter of Lichtenstein v. Board of Trustees of the Police Pension Fund*, 57 N.Y. 2d 1010, 1012 (1982)).

In interpreting Article 25, and indeed the entire Warsaw Convention, a familiar rule of treaty construction should be honored. *Geofroy v. Riggs*, 133 U.S. 258, 271-2 (1890):

> Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred. .

Similarly, *Bacardi Corp of America v. Domenech*, 311 U.S. 150, 163 (1940).

Hence, even if Article 25 were deemed a mere "subset" of Article 17 and Article 17 embodying that subset were deemed to cover Ms. Tseng's lawsuit, the airline's willful wrongdoing would activate the subset's rejection of Convention clauses which exclude and limit rights. It would deny availability to the air carrier of provisions of Article 17 which *exclude* liability for psychic injury and *limit* liability to accidental bodily injuries.[28] An "unnatural reading" of "accident" in Article 17 to include willful wrongs as accidental and preclude recovery because of these exclusions and limitations would create an internal inconsistency within the Convention. It would be "flatly inconsistent" with Article 25 and should not be allowed. *O'Connor v. United States*, 479 U.S. 27, 32 (1986).

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28. Similarly, in New York, damages for psychic injury flowing from such willful torts are recoverable. *Allinger v. City of Utica*, 226 A.D. 2d 1118, 641 N.Y.S. 2d 959 (1996); *Byrd v. New York City Transit Authority*, 172 A.D. 2d 579, 568 N.Y.S. 2d 629 (1991); *Vitale v Hagan*, 132 A.D. 2d 468, 517 N.Y.S. 2d 725 (1987), *mod. other grounds*, 71 N.Y. 2d 955, 528 N.Y.S. 2d 823 (1988) (cited in *Ismail v Cohen*, 899 F.2d 183, 187 (2d Cir. 1990)); *Cooper v. State*, 150 Misc. 2d 635, 569 N.Y.S. 2d 889 (1991).

VIII. THE RECENT ENACTMENT OF *MONTREAL PROTOCOL NO. 4* IS NOT ONLY (A) PROSPECTIVE IN EFFECT ONLY BUT ALSO (B) CONFIRMS THE NONEXCLUSIVITY OF THE WARSAW CONVENTION AS A BAR TO THIS CASE.

(A)

Some five years had passed from the time El Al wrongfully confined, assaulted and battered Ms. Tseng in New York before a sufficient number of Convention signatories agreed to make it — and Article 17 — the exclusive basis upon which a passenger could recover for personal injuries, without making exclusiveness retroactive to willful tort cases which had already accrued.

In New York, a cause of action for personal injuries is property which vests in the victim and devolves to his estate on death. N.Y. Estates, Trusts and Powers Law § 11-3.2; *Lancaster v. 46 NYL Partners*, 228 A.D. 2d 133, 138, 651 N.Y.S.2d 440, 444 (1996). It is frivolous to impart to the just-now sufficiently ratified (June 14, 1998 — (SG #2, 11)) *Montreal Protocol No. 4* the unexpressed retroactive invalidation by treaty of the already accrued New York causes of action, and retroactively deprive plaintiff of her property. *Toop v. Ulysses Land Company*, 237 U.S. 580, 35 S. Ct. 739 (1915). Not even *Amicus* US, extensively discussing *Montreal No. 4*, argues in favor of a retroactive impact on this case. On that issue US limits itself to contending that it would resolve exclusivity "*at least on a prospective basis*", and that

> any doubt about the Convention's exclusivity would be decisively resolved, *at least as to future cases*, by *Montreal Protocol No. 4*, if it is ratified by the United States.

(SG #2, 14).

The concurring opinion of Justice Scalia in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, at 855, 110 S. Ct. 1570 (1990), is apropos:

> The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.

The Court later expressed its agreement in *Landgraf v. USI Film Products*, 511 U.S. 244, 278 (1994).

(B)

The very adoption of Warsaw Convention modifications contained in *Montreal No. 4* by the Convention signatories, if indeed the altered Article 24 is read to preclude state willful tort actions which remain uncovered by the unaltered Article 17 — hardly a necessary result of *Montreal* — would then be further proof that the Article 24 which it changed was limited to accidents and not broad enough to cover all personal injury causes as contended by petitioner. The *Protocol* had been drafted 18 years before the events at the EL AL terminal in New York but was not law governing those events. It was not adopted and made effective for some 23 years. Breadth to cover "any action", not just accidents, was later added and made effective by the June, 1998, adoption of the *Protocol* by and for 30 signatories, not yet if ever including the United States. There would otherwise then have been no reason to adopt the changes effected by the *Protocol* if all personal injury causes, not just those related to accidents, had been covered originally in the eyes of the international signatories.

As petitioner points out in his brief (Pet Br. 38),

> Additional aids to interpretation of the Warsaw Convention may include the post-ratification conduct . . . of the contracting parties to the Convention.

The parties' post-Convention ratification conduct of ratifying *Montreal No. 4* 69 years after the Convention was born in 1929 says worlds of their understanding of the limited effect of Article 24 as it was when the JFK events took place.[29]

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29. The Solicitor General, in addition to Lodging three versions of Montreal (Cont'd)

IX. A FALSE FEAR IS SUBTLY PROMOTED BY PETITIONER IN THE "CONCLUSION" OF ITS BRIEF AND BY PETITIONER'S AMICUS AIR TRANSPORT ASSOCIATION (ATA) THAT THE JUDGMENT BELOW COMPROMISES AIRCRAFT AND PASSENGER SAFETY AND PASSENGER RIGHTS, BUT THE OPPOSITE IS TRUE AND RINGING THAT ALARM IS A DISTRACTING SMOKESCREEN SCARE TACTIC.

A. Aircraft and Passenger Security and DOT regulation, 14 C.F.R. § 129.25.

Though irrelevant to the *Question* on which petitioner sought *certiorari* and on which it was granted[30], petitioner and its ATA *amicus* (though notably not *amicus* US, *see* SG #2, 29, fn. 21) improperly seeks to insert the need for air transport security into the equation. Even if considered, it is meritless.

While petitioner waits for its "Conclusion", without legal references, to becloud the case before this Court with a security scare issue, having omitted it from the body of its brief, its *Amicus* ATA devotes an entire section of its brief to it. (ATABr, Point IV). Referenced most appropriately and unwittingly, but tellingly *against petitioner*, is 14 C.F.R. § 129 as an applicable FAA measure regarding security at airports. (ATABr, 19) The regulation is applicable, but petitioner cannot rely on it for it did not follow it.

14 C.F.R. § 129.25 Airplane security.

(Cont'd)

Protocol No. 4 with the Clerk, has Lodged what purports to be Montreal Protocol No. 3 which has never been ratified by the United States or gone into force anywhere. (SG #2, 12 fn. 7)

30. (Note Sup. Ct. Rule 14(1)(a) limiting review to "the questions set forth in the petition, or fairly included therein" and *Phillips v. Washington Legal Foundation*, __U.S.__ (96-1578, 6/15/98), applying that Rule).

> (*b*) Each foreign air carrier [31] landing or taking off in the United States shall adopt and use a security program, for each scheduled and public charter passenger operation, that meets the requirements of [subparagraphs (1)(2)(3)] [32]
>
> . . . . . [and]
>
> (*g*) Each foreign air carrier conducting an operation for which a security program is required by paragraph (b) (1), (2), or (3) of this section *shall refuse to transport—*
>
> *(1) Any person who does not consent to a search of his or her person in accordance with the security program* . . . (emph. added)

The consent must be to *something*. A person cannot "consent" unless told what she is consenting to. The DOT regulation calls for no less. It calls for the consent to be "to a search of his or her person in accordance with the security program". If EL AL had complied with § 129.25(g) and informed Tseng of her choices — either consent to that *something* — to be confined and subjected to an intimate body search apparently called for by EL AL's security program, or not consent and not fly — there would have been no tort to complain of. The regulation presupposes she be given the right to consent or to withhold her consent to a search in accordance with the security program after being told this airline's routine security program procedures include confinement and manual palpating of the most intimate parts of her anatomy. She was not told and was not given that right. If she had been informed and agreed, no unconsented to confinement and touching, which is to say no false imprisonment and assault and battery, would have

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31. The same security requirements govern domestic air carriers. 14 C.F.R. §§ 121.538, 108.9(b)(1).

32. Petitioner has conceded that this entire Regulation applies.

resulted. If she declined, she would not have been permitted to board but would have been allowed to go home free, unconfined and unviolated.

Petitioner could have protected its flight security according to its own lights by giving Tseng that choice. She was not given it. The record shows respondent was not presented with the § 129.25 voluntary alternatives before she was closed off in the room, denied freedom to leave, and subjected to the offensive intimate body search depicted by the record.

The requirement that foreign airlines comply with 14 C.F.R. § 129.25 explodes the myth that aircraft security would be compromised should the judgment on appeal be affirmed. The DOT regulation protects it thoroughly.

Allowing respondent the option implicit in § 129.25 to consent to be searched or forfeit the flight would not endanger its security or indeed even be relevant to it. An airline is given full control of the security precautions it deems necessary for flight safety. Nor does it even attempt to explain how giving a passenger the choice either to acquiesce to the airline's own security procedures or be kept off the plane would allow security risks to board. By the balanced federal regulations, the passenger's right not to submit to an intimate body search is so protected as to make illusory fears that aircraft safety would be compromised by an affirmance.[33]

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33. The *caveat* in *People v. Kuhn*, 33 N.Y. 2d 203, 210, 351 N.Y.S. 2d 649, 654, 306 N.E. 2d 777, 780 (1973), a criminal case evolving from an airport security check, is noteworthy:

> We do not hold, however, that once the magnetometer is "triggered, indicating the presence of metal upon a person, a further personal search or frisk of the passenger is authorized unless it can be shown that the passenger consents to such search. Failing to consent to a further search at this point would, of course, bar him from boarding the plane. Since the sole purpose of the airport security measures

(Cont'd)

Affirmance could have no effect whatsoever on international airline security as frighteningly projected by ATA's *amicus* brief. (ATABr., 20).

B. Passenger Rights

A bogus threat to passengers' rights against airlines is scaringly forecast by ATA if the Court affirms. (ATABr, 17). Assuming the unlikely posture and garb of zealous advocate of passengers' rights against its members, it speculates that an affirmance would deprive American citizens traveling abroad of the benefits of the Convention and expose them to the vagaries of local foreign law.

They are already exposed. However great its persuasiveness, this Court's mandate does not bind those foreign realms. If effect there be, an affirmance would likely encourage foreign courts not already so inclined to allow claims for willful airline tort to be pursued by victimized passengers under local law outside Article 17 which does not cover them. Far from encroaching on other passenger rights under the Convention, an affirmance will leave them intact.

(Cont'd)

is to prevent air piracy, there is no need to further search such a prospective passenger as he will not be permitted to board the plane and no longer represents a threat as a potential hijacker.

CONCLUSION

For the reasons stated above, the judgment should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

—v.—

TSUI YUAN TSENG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner EL AL respectfully submits its reply to the brief in opposition of Respondent Tsui Yuan Tseng.

REPLY TO COUNTER-STATEMENT OF THE NATURE OF THE CASE

Tseng was escorted into EL AL's private security room because her responses to questions posed by EL AL security led to the determination that she fit a "high risk" passenger profile.[1] (JA 7, R.31, Tr. 69-70; JA 3, R. 10, Ex. E. at 24-31, 57-58; JA 22 & 23). EL AL did not at any time request Tseng to remove her underclothing, jeans, t-shirt or socks. (JA 7, R. 31, Tr. 41-43, 62). Any contrary inference which Tseng attempts to create should be dismissed. Moreover, EL AL has never conceded "imprisonment." (R. Br. 1).[2] It is Tseng who conceded that she did not at any time object to the search, and

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[1] References to the Joint Appendix are indicated as "(JA ___)."

[2] References to Respondent's Brief in Opposition are indicated as "R. Br. ___."

that she never requested to leave the room. (JA 7, R. 31, Tr. 47-48).[3] At trial, Tseng testified that the questioning and physical search lasted approximately 10-15 minutes. (JA 7, R. 31, Tr. 18-19).

ARGUMENT

I

A FAITHFUL READING OF THE CONVENTION COMPELS THE CONCLUSION THAT THE CAUSE OF ACTION UNDER ARTICLE 17 IS EXCLUSIVE

A. The Court Should Uphold And Give Effect To The Interrelationship Of The Articles Under The Liability Chapter Of The Convention

Tseng reads Article 17 out of context and erroneously dismisses the all-encompassing language of Article 1, which expressly defines the scope of the Warsaw Convention[4] as applying to *all* international transportation by air.[5] Tseng isolates words and phrases within Articles 17, 24 and 25 to

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[3] Thus, based on Tseng's own testimony and irrespective of whether EL AL explicitly advised Tseng that she could forego the transportation if she did not wish to consent to the search, Tseng is unable to meet state law prerequisites to recovery. (JA 9, Brief for Defendant-Appellee-Cross-Appellant 21-24).

[4] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C.A. § 40105 (1997) (note).

[5] Tseng also contends that because the title of the Convention states that it is to apply only to "Certain Rules," intentional tort causes of action are available to provide her with a remedy where, as here, she indisputably cannot establish one under the Convention. (R. Br. 21-22). This reasoning is inconsistent with (1) Article 1, which unambiguously states that the Convention applies to all international transportation; (2) Article 24, which states that actions for damages arising out of such transportation "can only be brought" under Articles 17, 18 and 19;

support her plea in equity, and disregards the scope, structure and provisions of the Liability Chapter of the Convention, which expressly define carrier liability as a matter of law.

1. Failure to satisfy the substantive conditions to liability under Article 17 does not create a "pass-through" to state law

The finding of an accident within the meaning of Article 17 is one of two conditions precedent (the other being bodily injury) to any right of recovery for a personal injury claim against a carrier arising in the course of "international transportation." *See* Pet. Br. 17-18; US Br. 16-21; IATA Br. 4, 10; ATA Br. 22-23.[6] The Court already has held that the Convention does not provide for a right of recovery in the absence of bodily harm (*Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991)); the Court likewise should reject Tseng's contention that the failure to establish an Article 17 accident[7] as the cause of a passenger's injury makes the Convention inapplicable to the passenger's claims and permits recourse to state law.

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and (3) Articles 2(2) and 34, which state the three *exceptions* to Article 1. *See* Petitioner's Brief on the Merits 10-11 (hereinafter indicated as "Pet. Br. __").

[6] The Brief submitted by the Solicitor General of the United States is indicated as "US Br. __"; the *amici* briefs submitted by the International Air Transport Association and the Air Transport Association of America are indicated, respectively, as "IATA Br. __" and "ATA Br. ___".

[7] Petitioner has not conceded that the security search of Tseng fails to meet the "accident" condition within Article 17. *Compare* R. Br. 13; US Br. 18. EL AL has consistently preserved its position that the search may be considered an "accident." *See Tseng v. EL AL Israel Airlines, Ltd.*, 919 F. Supp. 155, 157-58 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 122 F.3d 99, 103-04 (2d Cir. 1997), *cert. granted in part*, 118 S. Ct. 1793 (1998). However, because Tseng fails to meet the "bodily injury" condition within Article 17, the "accident" issue need not, but may, be addressed by the Court to decide the question presented. *See Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978).

Tseng, in part, bases her argument on a misapplication of the holding in *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996). The Court in *Zicherman* concluded that Article 24 acts as a "pass-through," a direction to apply the law of the forum to the questions of who may bring suit and the types of damages for which they may be compensated. *Id.* at 229. Article 24 does not direct a "pass-through" for those instances when the substantive conditions to liability under Articles 17, 18 and 19 cannot be met.[8] In short, *Zicherman* recognizes that the text permits derogation from the Convention's goal of uniformity only where expressly stated.[9] The Court should reject Tseng's argument (R. Br. 21) that Article 24(2) is a means to evade the substantive rules of liability under Article 17. *See, e.g., In re Air Crash Near Cali, Colombia on Dec. 20, 1995*, 985 F. Supp. 1106, 1153 (S.D. Fla. 1997) ("[The *Floyd*] holding was not disturbed by *Zicherman*, and supports the view that the Convention operates as a 'pass-through' with respect to damages only where it does not embody a particular 'rule of law' on the recoverability of the damages in question.").

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[8] The clause "respective rights" in Article 24(2) was borne out of the drafters' desire to address issues of standing and the respective rights of beneficiaries regarding descent and distribution in a death action. *See* Pet. Br. 22-23, 32-34; *see also Second International Conference on Private Aeronautical Law Minutes* 255 (Robert C. Horner & Didier Legrez trans., 1975) ("*Warsaw Minutes*"); *Potter v. Delta Air Lines, Inc.*, 98 F.3d 881, 886 (5th Cir. 1996); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1488 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991); *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267, 1282-85 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991).

[9] Contrary to Tseng's persistent belief that the Court de-emphasized and essentially found irrelevant the goal of uniformity prevalent throughout the Convention (R. Br. 22-26), *Zicherman* noted: "Undoubtedly it was a primary function of the Warsaw Convention to foster uniformity in the law of international air travel . . . ." 516 U.S. at 230; *see also* Pet. Br. 11-13; *Warsaw Minutes* at 85 ("The object of this Convention is to insure uniformity of law . . . .").

2. The drafters intended Article 24 to apply to all claims for injury in the course of international transportation, irrespective of whether there is a right of recovery under Article 17

Reading the Convention as exclusive comports with the text of the treaty, the goals of the drafters in 1929, the drafting history, the subsequent conduct of the contracting nations and the reading of a sister signatory. (Pet. Br. 8-42). Article 24 plainly provides that the cause of action for death or personal injury can only be brought subject to the terms and conditions of the Convention. (Pet. Br. 13-23).[10] Because those terms and conditions do not provide a right of recovery, Tseng is not entitled to monetary relief.[11]

The drafting history of Articles 17 and 24 confirms the drafters' intention that Article 24 "cover" all personal injury claims arising in the course of international transportation. (Pet. Br. 34). Tseng chooses to dismiss (R. Br. 10) the direct, unequivocal and perhaps most salient statement regarding Article 24 at the Warsaw Conference, that the drafters intended to have the Convention serve as the exclusive basis for a cause of action arising within the course of international transportation. (Pet. Br. 35). Moreover, the drafters unanimously rejected (save the Japanese delegate) the Japanese proposal to permit national legislation creating

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[10] *Compare Dooley v. Korean Air Lines Co.*, 524 U.S. ___, 118 S. Ct. 1890, 1895, 141 L. Ed. 2d 102, 109 (1998) ("Congress . . . precluded the judiciary from enlarging either the class of beneficiaries or the recoverable damages" in a Death on the High Seas Act case).

[11] Tseng and the lower court erroneously read the "in the cases covered by" language in Article 24 to mean that a claim is not "covered" by Article 17 unless the passenger has a right of recovery under Article 17. *See* R. Br. 20-22; *Tseng*, 122 F.3d at 104-05. The Warsaw delegates used the phrase to distinguish liability for personal injury and death from damage to or loss of cargo and baggage because an earlier draft of Article 24 inadvertently neglected to reference cargo and baggage. *See Warsaw Minutes* at 212-13; *see also Jack v. Trans World Airlines, Inc.*, 820 F. Supp. 1218, 1225 (N.D. Cal. 1993).

exceptions to the now Article 23, which declares null and void laws to limit or exclude liability *other than as provided for by the Convention*. The British delegate commented:

> As regards the British Government, the sole reason which it has for entering into this Convention is the desire to achieve uniformity. If the conference adopts the point of view of Japan, we miss the point. The draft of the Convention is contrary, on several points, to our laws and to our customs, but we have decided to make sacrifices to obtain this uniformity.

Warsaw Minutes at 35-36; *see also id.* at 234 ("[I]f the Convention is not one, it will no longer exist. . . . [A] Convention which unifies certain rules cannot include reservations which interfere with precisely this unification."). *Accord Abnett v. British Airways plc*, [1997] 1 All E.R. 193 (H.L. 1996) (U.K.) (Pet. App. 65a) ("A balance was struck, in the interests of certainty and uniformity.").

The Convention created the first set of liability rules governing international air carriage. *See generally Warsaw Minutes* at 11-13. With this fundamental premise in mind, it is not absurd to read this treaty as providing the exclusive right of action and precluding liability altogether in cases such as the one before the Court.

3. Article 17 does not differentiate between harm resulting from accidental versus intentional acts

Article 17 requires as a prerequisite to presumptive[12] liability that an "accident" cause a passenger's injury. *See Floyd*, 499 U.S. at 535-36; *Saks*, 470 U.S. at 398. Respondent, applying a common law negligence analysis, misconstrues the term "accident" in Article 17 as equivalent to the

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[12] The Convention as drafted in 1929 created presumptive liability on the part of the carrier. To characterize the liability as "absolute" "is not entirely accurate." *Air France v. Saks*, 470 U.S. 392, 407 (1985).

term "accidental"[13] and as distinct from "intentional." (R. Br. 11-20). Article 17, however, does not support such a distinction. Article 17 provides that one of the conditions to a right of recovery is that the "passenger's injury is caused by an unexpected or unusual event . . . ." *Saks*, 470 U.S. at 405. Where, however, that event was the result of the carrier's wilful misconduct,[14] the passenger looks to Article 25 to obtain compensatory damages unhampered by Articles 20, 21 and 22. *See, e.g., Korean Air Lines Disaster*, 932 F. 2d at 1488-89.

Notwithstanding the express language of Article 25, Tseng attempts to read an exception to liability under Article 17 where "scienter" is alleged. (R. Br. 12, 24, 35). *Saks* does not support Tseng's scienter argument. The Court, in *Saks*, looked to historical interpretations of "accident" and noted that a 1903 British case observed that "an accident means any unintended and unexpected occurrence which produces hurt or loss." *Id.* at 398. The Court also reviewed French cases and dictionaries to conclude that, when "accident" is used to describe a cause of injury, "it is usually defined as a fortuitous, unexpected, unusual, or unintended event." *Id.* at 399-400 (citations omitted).

In reaching the definition of "accident," the Court in *Saks* did not emphasize the "unintended" qualification advocated by Tseng, but rather surveyed the myriad meanings of "accident," including its use in the text of the Convention, to arrive

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[13] Tseng inappropriately relies on several cases interpreting the term "accident" in insurance policies. *See* R. Br. 16 n.15; *see also* US Br. 18 n.11.

[14] Tseng repeatedly characterizes her claim as a "willful tort" in a futile attempt to avoid the words of Article 25—"wilful misconduct." However, Article 25 may not be invoked where the substantive conditions to Article 17 liability are not met (a finding of the lower court which Tseng did not seek to review). Furthermore, Tseng did not even raise Article 25 in her opposition to the petition for writ of *certiorari* (*see* US Br. 18 n.10) or file a cross-petition.

at a definition which repeatedly stressed that the "event"[15] must be "unexpected" and "unusual" to give rise to potential liability under Article 17. *Id.* at 400, 405 & 406.[16] The gravamen of the *Saks* decision is that the injury causing conduct should be viewed in an objective manner as creating an unexpected or unusual event.

Moreover, the Court in *Saks* recognized that the definition of "accident" has been applied to include torts, such as terrorist attacks, which cannot properly be characterized as accidental. 470 U.S. at 405. Article 17 may not properly be limited to conduct which only correlates with some gradation of negligence, but stopping short of "scienter".

B. Article 25, By Its Terms, Cannot Stand Alone

If Tseng cannot satisfy the conditions to recovery for her personal injury action under Article 17, either because her alleged injuries were not the result of an accident within the meaning of Article 17 (according to the court below) or because she did not sustain bodily injury (an undisputed find-

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[15] The courts have refrained from using the term occurrence to define an Article 17 "accident" in light of the use of the term "occurrence" in Article 18. *See Saks*, 470 U.S. at 398; R. Br. 18. Regrettably, there is no discussion in the drafting history to elucidate whether the distinction was intentional or inadvertent. Interestingly, however, two of the French definitions for "accident" were "accident" and "occurrence." *See* Pet. Br. 18 n.17 (quoting The Concise Oxford French Dictionary 8 (1934)). Perhaps the syntax reflects a distinction between harm to passengers and damage to goods and baggage—passengers sustain injuries as the result of accidents, not occurrences; cargo damages occur in the absence of an accident (*e.g.*, partial loss or spoilage). *See also Warsaw Minutes* at 205 (recognizing that damaged or lost cargo and baggage "are entirely different liability cases" from "death or wounding"). *Accord id.* at 80 ("Goods don't enter [an aerodrome] if they are not carried!").

[16] Furthermore, *Potter* never referred to the incident in that case as an "unintended occurrence." (R. Br. 24). The Fifth Circuit held that the incident was not an "unexpected *event* external to the passenger." 98 F.3d at 884 (emphasis in opinion) (quoting *Saks*, 470 U.S. at 406).

ing by the trial court), the Convention does not permit Tseng to create a parallel action under Article 25. *See* R. Br. 29, 35-36; *see also Tseng*, 122 F.3d at 104. Tseng does not dispute that her emotional distress arose during the course of international transportation. Rather, she attempts to avoid the Article 17 question presented to the Court by characterizing EL AL's security search as a "willful tort."

1. Article 25 is given meaning by reading the preceding articles in the Liability Chapter

A proper construction of the Warsaw Convention compels the conclusion that if, and only if, Article 17 permits recovery may the trial court advance to the next questions—exonerated (Article 20), mitigated (Articles 21 and 23), limited (Article 22) or unlimited (Article 25) liability. *See* Pet. Br. at 25-26 (setting forth the liability scheme of the Liability Chapter of the Convention). The intentional (or "wilful" as stated in Article 25) misconduct of a carrier subjects the carrier to liability for compensatory damages without limit *only* where there is a right of recovery under Article 17, 18 or 19. As explained by the lower court:

> The two articles [17 and 25] are not mutually exclusive; rather the finding of an "accident" under Article 17 is a prerequisite to the imposition of any liability for the personal injuries of a passenger. . . . Article 25 simply describes a subset of "accidents" that are more egregious and to which a greater degree of culpability attaches.

Tseng, 122 F.3d at 104 (citations omitted); *see also Li v. Quraishi*, 780 F. Supp. 117, 119 (E.D.N.Y. 1992) ("Article 17 and Article 25 . . . must be construed together in order to understand the issue" of carrier liability for wilful misconduct).

Respondent's reading of the Convention wrongly advocates isolated consideration of Article 25, without reference to the

other provisions of Chapter III, the Liability Chapter of the Convention. Article 25 is triggered only "if *the damage* is caused by [a carrier's] wilful misconduct." 49 Stat. at 3020 (emphasis added). To determine the origin of *the damage*, the reader necessarily must look to the liability-creating articles (*i.e.*, Article 17, 18 or 19). In other words, the express reference to *the damage* in Article 25 is given meaning by virtue of the creation of liability within Articles 17, 18 and 19—"The carrier shall be liable for damage . . . ." 49 Stat. at 3018, 3019.

The regulation of the liability created by Articles 17, 18 and 19 is evident by reference to the use of the "damage" term under other provisions within the Liability Chapter. The "damage" referenced in Articles 17, 18 and 19 is "the damage" for which Article 25 may provide recovery without limit. Conversely, under Articles 20(1) and 21, the carrier may avoid or limit liability for Article 17, 18 or 19 "damage." If, however, the conditions, limits or exceptions of Article 20, 21 or 25 do not apply. Article 22 limits the "damages" recoverable under Article 17, 18 or 19.

Thus, Tseng's attempt to excise Article 25 from Article 17 should be rejected. *See Lockerbie*, 928 F. 2d at 1286 ("Article 25 only refers to terms within the Convention.").

2. Article 25 does not create an independent cause of action, but rather permits recovery of compensable damages without limit when the carrier's conduct is the "equivalent" of wilful misconduct

The plain language of Article 25 does not create an independent cause of action as contended by Tseng. (R. Br. 29, 33-36). *See Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1483 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991) (rejecting plaintiffs' argument that in addition to removing the limitation on compensatory damages, Article 25 also creates a cause of action authorizing recovery of

punitive damages). The Eleventh Circuit in *Floyd* properly concluded:

> The structure of the Convention, the subsequent interpretation by parties, and the unanimous case law persuade us that Article 25 operates only to remove the liability limitations of Article 22 in cases of "willful misconduct" by the air carrier, and was not intended to provide an independent right of action.

872 F.2d at 1483.

Tseng misinterprets Article 25's express reference to "the law of the court to which the case is submitted." (R. Br. 34). "[T]he only reasonable construction of Article 25's reference to the law of the forum jurisdiction is deference to that law for the purposes of defining 'dol' or 'wilful misconduct.' " *Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1028 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 959 (1997).[17]

Tseng's alternative argument, that Article 17 qualifies as one of the provisions that "exclude" or "limit" liability under Article 25 (R. Br. 36), is nonsensical. Article 17 *includes* the only basis for liability for bodily injury.[18] Plainly, Articles 20, 21 and 22 provide potential limits on the liability created by Article 17 (*see Korean Air Lines Disaster*, 932 F.2d at 1488-89; *Lockerbie*, 928 F.2d at 1285-86), and Article 25 is " 'most reasonably interpreted as [an] exception[ ] to the limitations on the recovery of *compensatory* damages within the Convention . . . ." *Korean Air Lines Disaster*, 932 F.2d at 1489

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[17] The Second Circuit's construction is both reasonable and supported by the drafting history. The drafters could not devise a uniform rule regarding liability of a carrier for the acts of its employees and, thus, made express the application of local law to this discrete issue. *Id.* at 1029; *see also Warsaw Minutes* at 62-66.

[18] Tseng confuses the "rights" which are to be expanded under *De Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) and *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940). (R. Br. 9, 27, 28, 36). It is only the rights provided by the treaty which fall within the parameters of this rule of treaty construction. (Pet. Br. 20 n.23).

(quoting *In re Air Crash Disaster at Gander, Newfoundland on Dec. 12, 1985*, 684 F. Supp. 927, 932 (W.D. Ky. 1987) (emphasis in original)). *Accord Lockerbie*, 928 F.2d at 1285-86; *Floyd*, 872 F.2d at 1484.[19]

3. The drafting history confirms that Article 25 may, in certain circumstances, void the limits and conditions of liability in the actions created by Articles 17, 18 and 19

The evolution of the text of Article 25 substantiates that any action arising from an "illicit act" on the part of the carrier must be based on the Convention. Reading seriatim the 1928 CITEJA draft,[20] the draft presented at the Warsaw Conference[21] and the present language of Article 25 demonstrates the drafters' intent:

Article 26 [Third Session of CITEJA]	In case of accident, loss, damage or delay, the liability action may not be brought against the carrier except on the basis of this convention, *unless the damage arises through an intentional unlawful act as to which he bears the liability; in such case, he shall not have the right to avail himself of the provisions of this convention which exclude in whole or in part his direct liability* or that derived from the errors or omissions of his servants or agents.

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[19] If Article 25 were read to create a right of recourse to state liability law, that state's damages law surely also would apply (including potentially the right to recover punitive damages, contrary to *Korean Air Lines Disaster, Lockerbie* and *Floyd*). This construction of Article 25 would run afoul of the entire compensatory damage scheme of the Convention. *See also Zickerman*, 516 U.S. at 225-28.

[20] G. Nathan Calkins, Jr., *The Cause of Action Under the Warsaw Convention*, Part I, 26 J. Air L. & Com. 217, 221-23 (Summer 1959) (preliminary draft of convention at outset of Third Session) (emphasis added) ("Calkins, Part I").

[21] *Warsaw Minutes* at 265-66 (emphasis added).

Article 24 [presented at Warsaw]	In the cases provided for in Article 21 [now Articles 17, 18 and 19] . . . . *If the damage arises from an intentional illicit act for which the carrier is responsible, he will not have the right to avail himself of the provisions of this Convention, which exclude in all or in part his direct liability* or that derived from the faults of his servants.
Article 25(1) [Warsaw Convention]	The carrier *shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct* or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct. 49 Stat. at 3020.

The predecessor drafts to Article 25 cross-referenced the provisions which exclude or limit a carrier's liability (Articles 20, 21 and 22) for an accident, occurrence or delay (Articles 17, 18 and 19). The drafting history also shows that a finding of an "intentional unlawful act" or "intentional illicit act" or "wilful misconduct" was intended only to preclude a carrier from limiting the liability created by Articles 17, 18 and 19, the three "most important articles of the Convention." *Warsaw Minutes* at 205. Article 25 was never intended to create an alternative source for carrier liability, but rather to free the claimant from the confines of Article 22 in cases where the substantive conditions to liability under Article 17, 18 or 19 are met.

C. Petitioner's Construction Of Articles 17 And 24 Is A Faithful Reading Of The Convention

In her effort to discredit the natural reading of the Convention, Tseng resorts to hyperbole and equity-based arguments and disregards the construction intended by its drafters.

See, e.g., R. Br. 5-11. The Court, however, should give effect to one of the indisputable purposes behind the drafting of the Warsaw Convention—to create carrier liability where none existed (subject to prescribed terms and conditions), a just and equitable endeavor in 1929.[22] Although courts may be tempted to impose common law theories or reasoning to this treaty, which is based on the "French law of contractual liability" (Calkins, Part I at 223), the temptation must be resisted to uphold the contract of carriage as intended by the Convention's drafters. *See also* Pet. Br. 18 n.18, 22-23. "Whatever may be the current view among Convention signatories, in 1929 the parties" concerned themselves more with limiting the liability of carriers in order to "foster the growth of the fledgling commercial aviation industry" than with providing a full recovery to passengers for any and all claims arising during international transportation by air. *Floyd*, 499 U.S. at 546.

The Convention was intended to and does, in fact, under certain circumstances deprive passengers who sustain injury in the course of international transportation of a contractual right of recovery. Indeed, passengers that have ostensibly experienced emotional distress in graver circumstances have been denied a right of recovery under the Convention. *See, e.g., Floyd*, 499 U.S. at 533 (passengers informed that

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[22] The British delegate, when advocating to exonerate a carrier from passenger liability for the errors of the pilot (a position ultimately rejected by the delegates), noted:

> In the Convention[,] we propose to replace a system of free contract by a system of law, of regulation, of by-laws. My Government feels that these rules must be of such a nature that they can appear in a just, equitable contract between equal parties placed upon equal footing.

Warsaw Minutes at 42; *see also id.* at 48 (cited in petition for writ of *certiorari* at 12 n.8). The construction favoring exclusivity is just and equitable—a carrier's presumptive liability to a passenger who sustains bodily harm is a trade off for omitting liability in cases of non-corporal harm, as aptly termed by *amicus* IATA (IATA Br.13).

plane "would be ditched in the Atlantic Ocean" because of engine failure denied any recovery for purely mental injuries); *Li*, 780 F. Supp. at 118, 120 (claims for "severe emotional and psychological damage" of mother and her child arising out of fellow passenger urinating on the child dismissed). However antithetical to the common law principles which have developed since 1929, the Court should uphold the provisions of this treaty, even if there may not be a remedy for every alleged wrong.

The most natural reading of the Convention is that the drafters intended there to be no recovery for non-corporal or non-accident claims, irrespective of whether a carrier's conduct is the equivalent of wilful misconduct. According to Tseng's illogical construction of the Convention, two passengers both claiming only emotional distress would have differing results depending on whether the harm was the result of an Article 17 accident. If the injury was not the result of an Article 17 accident (*Tseng*), the passenger may be entitled to recover unlimited damages under state law, but if the harm was the result of an Article 17 accident (*Floyd*), the passenger is not entitled to any recovery. This is the true "illogical result," the result advocated by Tseng, and the ultimate consequence if the Court were to affirm the lower court's decision.

Circumvention of the treaty in a judicial effort to ensure a remedy for every wrong (real or imagined) results in a tortured application of the Convention and eviscerates the rule of uniformity of international air carriage liability law. The decision of the court below must be reversed to uphold this treaty as intended by its drafters—uniform application of the law of carrier liability in international transportation by air.

II

THE WARSAW CONVENTION PREEMPTS THE FIELD PRESCRIBED BY ARTICLE 1

Tseng is misguided in her application of federal preemption case law, and the cases she has cited do not address international treaties.[23] *See* R. Br. 31-33. The Court has recognized the following bases for federal preemption: (1) Congress can expressly provide for preemption within the federal law (*e.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977));[24] (2) preemption may be implied where the federal law is so pervasive as to leave no room for supplementary state regulation (*e.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988)); *or* (3) the state regulation may be displaced where it conflicts with or frustrates the federal law (*e.g.*, *Boggs v. Boggs*, 520 U.S. 833 (1997)).

The Court further has recognized that, unlike a federal statute, a treaty is "solemnly adopted by the governments of many separate nations" (*Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989)), and its construction by sister signatories is " 'entitled to considerable weight.' " *Saks*, 470 U.S. at 404 (citation omitted). The Court thus takes into consideration the international stature of a treaty, and state law yields when it is inconsistent with or impairs the policy or provisions of a treaty. *See United States v. Pink*, 315 U.S. 203, 231-32 (1942). "A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a state Legislature can stand in its way." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236 (1796); *see also* U.S. Const. art. VI, cl. 2. *Accord*

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[23] Although not addressed by the district court or the court below, federal preemption law is "fairly comprised in" the question presented and, therefore, may be addressed by the Court. *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980).

[24] It is axiomatic that the Warsaw Convention does not contain an express enabling clause that it "supersedes" state law. *Compare Rath Packing Co.*, 430 U.S. at 538-40.

Restatement (Third) of Foreign Relations Law § 115 cmt. e (1987) (the Supremacy Clause implies that a treaty or international agreement may be held to occupy a field, preempt a subject and supersede state law or policy).

State law is preempted by the Convention, by virtue of the express language of Article 1(1), which states:

> This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

49 Stat. at 3014. Accordingly, the Court should hold that the Convention preempts the whole field defined by Article 1. The field affects the "equilibrium in our foreign relations" and, thus, "any state power which may exist 'is restricted to the narrowest of limits.' " *Pink*, 315 U.S. at 232 (citation omitted); *see also Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968) (even if state statute is not a gross intrusion into the federal domain, it must bow to superior federal policy); *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (Court inferred intent to preempt from the dominance of the federal interest in foreign affairs, the supremacy of national power in foreign affairs and the federal regulation of the field).[25]

The Court also should hold that application of state law would frustrate the liability scheme of the Convention, thereby creating a direct conflict with the objective and purpose of the treaty. As the Fifth Circuit in *Potter* correctly held, the Convention's intended goal of uniformity in the field of international air transportation would be frustrated if

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[25] The field of international or interstate air transportation is traditionally an area regulated by federal law. *See United States v. Helsley*, 615 F.2d 784, 786 (9th Cir. 1979); *see also Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355, 356 (1994); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

passengers could invoke state law to govern claims arising in the course of Convention transportation (98 F.3d at 885), and thus subject a carrier to the potentially differing laws of the 50 states of the United States and the some 120 nation states that are a party to the Convention. *See also Lockerbie*, 928 F.2d at 1274-75.

Accordingly, proper application of federal preemption criteria requires that the Convention trump state law. To permit recourse to state law under Tseng's circumstances would thwart the intent and objectives of the Convention in an area of such self-evident international interest as security of air transportation. *See* ATA Br. 18-21; US Br. in support of petition for writ of *certiorari* at 9. The international stature of the treaty and its far reaching implications, considerations overlooked by Tseng, confirm that the field which the Convention occupies supersedes state law.

III

RATIFICATION OF MONTREAL PROTOCOL NO. 4 WILL FURTHER, BUT NOT RESOLVE, THE ISSUE OF EXCLUSIVITY

Article 24, as amended by Montreal Protocol No. 4,[26] is consistent with Article 24 of the Warsaw Convention. Both provisions direct a claimant to seek relief under Article 17, 18 or 19 and preempt application of state law where the claim arises in the course of international air transportation. *See* Pet. Br. 38; US Br. 26-28; ATA Br. 10-11; IATA Br. 4. Unfortunately, however, unless the Court upholds exclusivity in this case, the future ratification of Montreal Protocol No. 4 will not foreclose the debate. *Compare* US Br. 28-29. As both parties and *amici* recognize, Montreal Protocol No. 4 leaves

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[26] International Civil Aviation Organization, 2 *Documents of the International Conference on Air Law, Montreal*, ICAO Doc. 9154-LC/174-2 (1975).

unchanged the text of Article 17.[27] Thus, trial courts still will be faced with the argument proffered by Tseng—that the Convention is inapplicable when an injury arising in the course of international transportation is not caused by an "accident" within the meaning of Article 17. (R. Br. 19-20). Tseng's focus on an Article 17 "accident" as a prerequisite to application of the Convention demonstrates a disputed issue that will remain even after the anticipated ratification of Montreal Protocol No. 4.

While Article 17 is unamended, Article 24's introductory clause has been amended to substitute "[i]n the cases covered by Article 17" with "[i]n the carriage of passengers and baggage." The Protocol, however, still retains the "however founded" phrase. The lower courts have been addressing (and would continue to address) the argument that the Convention is not exclusive on the basis that the claimant's action has been "founded" on state law. *See* Pet. Br. 21-23.

Amici hope and expect that "the proposed change in the introductory clause to [Article 24 will make it] abundantly clear that the Convention's 'conditions' for, and 'limits' on, liability [will] apply to *all* suits by passengers for personal injuries arising in the course of international air travel . . . ." US Br. 27; *see also* ATA Br. 10. However, because Montreal Protocol No. 4 leaves unamended Article 17 and only amends, in part, the language of Article 24, the Court should resolve the issue of exclusivity, which will continue to be a recurring issue in the interpretation and application of the Warsaw Convention.

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[27] It is somewhat noteworthy that Article 25 is modified in Montreal Protocol No. 4. Reference to state law as a means of defining "wilful misconduct" has been deleted, thereby lending further support for the lower court's conclusion that Article 25 was intended to be a "subset" of Article 17. *Tseng*, 122 F.3d at 104.

CONCLUSION

The judiciary must uphold the terms and conditions of a treaty. The Court should uphold the express language of Articles 17 and 24, concur with the holding of the House of Lords in *Abnett*, enforce uniformity and find that the Convention provides the exclusive basis for carrier liability. Because Tseng's personal injury claim against EL AL indisputably arose in the course of Warsaw Convention transportation and because her claim fails to meet the conditions precedent to recovery under Article 17, the Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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No. 97-475

In the Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD., PETITIONER

v.

TSUI YUAN TSENG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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36 pp

QUESTION PRESENTED

Whether a passenger who suffers personal injury within the scope of the Warsaw Convention (which addresses international transportation by air), but who cannot meet the conditions set forth in Article 17 of the Convention for establishing that a carrier is liable under the Convention itself, may nonetheless seek relief under state law.

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INTEREST OF THE UNITED STATES

As a party to the Warsaw Convention, the United States has a substantial interest in the manner in which the Convention is interpreted by the courts of this country. In response to this Court's invitation, the Solicitor General filed a brief at the petition stage on behalf of the United States as amicus curiae, recommending that the Court grant the petition for a writ of certiorari limited to the question presented here.

STATEMENT

1. The Convention for the Unification of Certain Rules Relating to International Transportation by Air (1929), 49 Stat. 3000 (49 U.S.C. 40105 note),[1] popularly known as the Warsaw Convention, was designed to achieve two basic purposes: to "foster uniformity in the law of international air travel," *Zicherman* v.

[1] This brief cites the various provisions of the Convention directly. Those provisions are codified at 49 U.S.C. 40105 note.

Korean Air Lines Co., 516 U.S. 217, 230 (1996), and to "limit[ ] the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry," *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 546 (1991). To those ends, the Convention prescribes an extensive set of legal principles generally applicable "to all international transportation of persons, baggage or goods performed by aircraft." Art. 1(1); see generally A. Lowenfeld & A. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

At the core of the Convention is a series of provisions governing the nature and scope of a carrier's liability for harms occurring in the course of international air travel. The Convention divides such harms into three categories: personal injury (Article 17), damaged or lost baggage or goods (Article 18), and damage due to delay (Article 19). Article 17, which is at issue here, makes carriers "liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." It is now generally accepted that a passenger satisfying the liability conditions of Article 17 may bring a cause of action against a carrier directly under the Convention. See *Benjamins* v. *British European Airways*, 572 F.2d 913, 918-919 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979); *St. Paul Ins. Co.* v. *Venezuelan Int'l Airways, Inc.*, 807 F.2d 1543, 1546 (11th Cir. 1987); *Boehringer-Mannheim Diagnostics, Inc.* v. *Pan Am. World Airways, Inc.*, 737 F.2d 456, 458-459 (5th Cir. 1984), cert. denied, 469 U.S. 1186 (1985); *In re Mexico City Aircrash of Oct. 31,*

1979, 708 F.2d 400, 408-415 (9th Cir. 1983); cf. *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 928 F.2d 1267, 1282 (2d Cir.), cert. denied, 502 U.S. 920 (1991).

At the time of the Convention, carriers commonly made their services contingent on a passenger's contractual waiver of the right to bring suit for personal injury, and such waivers were often enforceable in court. See Pet. App. 53a-54a; *Second Int'l Conference on Private Aeronautical Law, Minutes, Oct. 4-12, 1929, Warsaw* 47 (R. Horner & D. Legrez trans. 1975) (*Minutes*). To ensure that carriers could not short-circuit Article 17 (or Articles 18 and 19) in that manner, the delegates to the Convention added Article 23, which nullifies "[a]ny provision tending to relieve the carrier of liability." Moreover, to reduce litigation concerning questions of fault, the delegates added Article 20, which, when combined with Article 17, creates a presumption of liability that a carrier can rebut only by "prov[ing] that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Art. 20(1).

The creation of a non-waivable cause of action for personal injury under Article 17, together with the presumption of liability added by Article 20, was part of a larger compromise designed to balance the interests of passengers against the interests of the nascent airline industry. Two key provisions of the Convention protect that industry's interests. First, Article 22(1) limits the amount that can be recovered in the event of an accident-related death or bodily injury. The delegates to the Convention set that limit at 125,000 francs, equivalent in 1929 to approximately $4900 dollars. See A. Lowenfeld & A. Mendelsohn,

supra, 80 Harv. L. Rev. at 499 & n.10; see also *Floyd*, 499 U.S. at 546. That was a "low amount even by 1929 standards," *Floyd*, 499 U.S. at 546, and, over the years, foreign and domestic airlines have entered into voluntary, private agreements to waive major aspects of the liability limitations imposed by the Convention. See *id.* at 549.[2]

Second, as a counterpart to Article 23's prohibition on attempts by carriers to circumvent the Convention's liability regime through contractual waiver clauses, the delegates added a provision barring passengers from seeking to circumvent that regime (and in particular its limitation on damages) by bringing suit under domestic law outside the terms of the Convention. That provision, Article 24, gives preemptive effect to Articles 17, 18, and 19, which, as discussed, respectively address a carrier's liability for personal injury, damaged or lost baggage and goods, and delay.

Article 24(1) addresses the latter two categories of liability: "In the cases covered by articles 18 and 19

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[2] In the most recent such agreement, concluded in 1996, several dozen major airlines agreed to waive any limit on compensatory liability for claims arising under, and satisfying the liability conditions of, Article 17. (Punitive damages remain unrecoverable. See generally *Lockerbie*, *supra*; *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991).) Those airlines further agreed to waive the defense of non-negligence under Article 20 (and thereby effectively agreed to strict liability) for such claims in an amount up to 100,000 "Special Drawing Rights," which, at the current exchange rate, equals approximately $135,000. See Pet. App. 8a; *International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention*, approved by Dep't of Transportation Order 97-1-2, 1997 WL 4834 (D.O.T. Jan. 8, 1997); see also pp. 10-12 and note 5, *infra* (discussing Montreal Protocol No. 4 and Hague Protocol of 1955).

any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Article 24(2) then addresses personal injury: "In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." The delegates added the final clause ("without prejudice to the questions * * *") because they could not reach consensus on the availability of wrongful death actions and, more generally, on "the questions of who may recover and what compensatory damages are available to them," *Zicherman*, 516 U.S. at 225; those secondary questions they therefore "left to domestic law." See *ibid.*; see generally *Dooley* v. *Korean Air Lines Co.*, 118 S. Ct. 1890 (1998). In contrast, the delegates could and did agree on rules governing the antecedent question of *which events* would subject carriers to personal-injury liability, and those rules appear in Article 17. The principal dispute in this case is whether *those* rules are exclusive: whether, despite Article 24, a plaintiff may sue under local law if she cannot satisfy the conditions of liability under Article 17 for passenger injuries arising during the course of international air travel.

2. a. On May 22, 1993, respondent Tsui Yuan Tseng arrived at John F. Kennedy International Airport in New York to board a flight to Tel Aviv. Pet. App. 3a-4a. The flight was provided by petitioner El Al Israel Airlines, Ltd., a carrier principally owned by the State of Israel. C.A. App. A9-A10.[3] Respondent went

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[3] Respondent has previously argued (see Br. in Opp. 9-11) that, because of Israel's ownership interest, the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1602, *et seq.*, deprives

to El Al's terminal, presented her ticket and U.S. passport to an El Al security guard, entered the terminal building, and proceeded to a security area, where she was asked routine questions about her destination. Pet. App. 4a. Based on her answers, which the security guard considered "illogical," respondent was classified as a "high risk" passenger. *Ibid.*

Respondent was taken to a private room, where she was subjected to a security search for explosives and detonating devices. She was told to lower her pants to mid-hip level and to remove her shoes, jacket, and sweater. A female security guard then conducted an exhaustive manual search of respondent's entire body outside of her clothing. The search lasted 15 minutes, and it conformed to El Al procedures. See Pet. App. 4a. The parties appear to agree that respondent did not object to the search and that she had the option of refusing to submit to it, thereby forfeiting the right to board the flight. The parties appear to disagree, however, about whether respondent was told (or should reasonably have known) that she could assert that option. See Tseng Br. in Opp. 2-3.

After the search, El Al personnel determined that respondent did not present a security risk, and they permitted her to board the flight. Respondent later testified that she was "really sick and very upset"

El Al of the protections of the Warsaw Convention. That suggestion is without merit. The FSIA makes a foreign state and its agencies "liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. In this context, that means that the Convention preempts state-law claims against airlines owned by foreign sovereigns to the same extent that it preempts such claims against privately owned airlines. It does not somehow render the former class of airlines *more* susceptible than the latter to claims under state law.

during the flight, that she was "emotionally traumatized and disturbed" during her month-long trip to Israel and thereafter, and that she ultimately had to undergo medical and psychiatric treatment. Pet. App. 4a. Respondent did not claim, however, to have suffered any physical injury. *Id.* at 4a-5a, 28a.

b. Respondent brought suit in state court. She alleged that petitioner "assaulted, and falsely imprisoned and physically and mentally abused her," and she sought $5 million in damages under state-law theories of tort. C.A. App. A13. Petitioner removed the case to federal court pursuant to 28 U.S.C. 1441(d), which authorizes the removal of any action against a "foreign state" as defined in 28 U.S.C. 1603(a). Pet. App. 5a; see C.A. App. A9-A10.

After discovery and a trial, the district court dismissed respondent's claim for personal injury. Pet. App. 26a-28a. The court first noted that Article 17 creates a cause of action only for injuries suffered as a result of an "accident," which this Court has defined as "an unexpected or unusual event or happening that is external to the passenger." *Id.* at 26a (quoting *Air France* v. *Saks*, 470 U.S. 392, 405 (1985)). The court determined that, because petitioner "erroneously" subjected respondent to an "unexpected" full-body search, the search "is fairly accurately characterized as an accident," and the Convention therefore "applies." Pet. App. 27a-28a. The court then dismissed respondent's personal injury claim on the ground that Article 17 allows recovery only for bodily injury and not for the purely psychic injury that respondent had alleged. *Id.* at 28a (citing *Floyd*, 499 U.S. at 552).

c. The court of appeals reversed in relevant part. Pet. App. 1a-23a. The court first ruled that the search did not qualify as an "accident" within the

meaning of Article 17, reasoning that security searches "are an anticipated aspect of international travel," that the search at issue "was part of the airline's normal procedure," and that "the Convention does not aim to derogate from the efforts of international air carriers to prevent violence and terrorism, efforts which are widely recognized and encouraged in the law." Pet. App. 11a-12a. As a result, "under the terms of Article 17 of the Warsaw Convention, [petitioner] may not be held liable in damages to [respondent]." *Id.* at 14a.

The court then held, however, that the Convention does not exclusively define the circumstances under which passengers may recover for personal injuries sustained in the course of international air travel. Pet. App. 14a-23a. According to the court, Article 24 "clearly states that resort to local law is precluded only where the incident is 'covered' by Article 17, meaning where there has been an accident, either on the plane or in the course of embarking or disembarking, which led to death, wounding or other bodily injury." *Id.* at 15a. To preclude resort to local law where a plaintiff cannot meet the liability criteria under Article 17, the court believed, "would require rewriting Article 24 or Article 17, a task only the signatories to the Convention may undertake." *Id.* at 15a-16a.

The court sought support for its construction of Article 24 in the drafting history of the Convention, Pet. App. 16a-17a, and in the Convention's underlying purposes, *id.* at 18a-23a. The court recognized that "one of the two primary purposes of the Convention was to shield carriers from financial catastrophe following in the wake of a major accident," but it concluded that "the Convention does not purport to insu-

late carriers from the ordinary risks of doing business, such as keeping their facilities in good repair." *Id.* at 19a. Finally, the court held that, as interpreted by this Court in *Zicherman*, "the Convention expresses no compelling interest in uniformity that would warrant us in supplanting an otherwise applicable body of law, here state law." *Id.* at 21a.[4]

In narrowly construing Article 24, the court of appeals deepened a conflict in judicial authority on whether the Convention exclusively defines the conditions for personal injury liability in the context of international air travel. As the court recognized (Pet. App. 18a-21a), its decision in this case, like the Third Circuit's decision in *Abramson* v. *Japan Airlines Co.*, 739 F.2d 130 (1984), cert. denied, 470 U.S. 1059 (1985), is in conflict with the Fifth Circuit's decision in *Potter* v. *Delta Air Lines, Inc.*, 98 F.3d 881 (1996), and with the British House of Lords' recent decision in *Abnett* v. *British Airways PLC*, 1 All E.R. 193 (1996) (reprinted at Pet. App. 34a-65a) (referred to as *Sidhu* v. *British Airways* in the decision below). See also *Krys* v. *Lufthansa German Airlines*, 119 F.3d 1515, 1518 n.8 (11th Cir. 1997), cert. denied, 118 S. Ct. 1042 (1998).

3. This Court granted certiorari on May 18, 1998. 118 S. Ct. 1793. Since then, the Senate Foreign Relations Committee has voted to report to the full Senate certain treaty amendments that, if ratified, could

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[4] Respondent also alleged, in addition to her personal injury claim, a claim for lost baggage. See Pet. App. 5a. The district court ruled that the claim had merit and awarded her $1034.90 in damages. *Id.* at 32a-33a. Without analysis, the court of appeals rejected petitioner's cross-appeal challenging that award. *Id.* at 23a. This Court did not grant review of the second question presented in the petition, which challenged the court of appeals' judgment on that issue. 118 S. Ct. 1793 (1998).

affect how this Court might choose to dispose of this case.

In January 1977, President Ford transmitted to the Senate Montreal Protocol No. 4, which would amend substantial portions of the Warsaw Convention, including Article 24. See Message from the President of the United States Transmitting Two Related Protocols Done at Montreal on September 25, 1975 (Transmittal Letter); Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Montreal, Sept. 25, 1975 (Montreal Protocol No. 4).[5] As this Court has observed, both Montreal Protocol No. 4 and a separate Montreal Protocol No. 3 (which largely incorporates the Guatemala City Protocol of 1971)[6] have remained in the Senate, unratified,

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[5] On July 1, 1998, we notified this Court by letter of the Senate's renewed consideration of Montreal Protocol No. 4. We have lodged with the Clerk of this Court copies of that Protocol, President Ford's transmittal letter, and the Hague Protocol of 1955, which Articles XVII and XIX of Montreal Protocol No. 4 incorporate by reference and which had not previously been ratified by the United States. The Hague Protocol would itself add or amend several provisions of the Warsaw Convention that are not directly at issue here. See, *e.g.*, Hague Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, done Sept. 28, 1955, Arts. XI (raising personal injury damages cap to 250,000 francs), XII (addressing contractual provisions "governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried").

[6] See Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Montreal, Sept. 25, 1975 (Montreal Protocol No. 3), Art. VII(2); Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, done at Guatemala City, Mar. 8, 1971 (Guatemala City Protocol).

since the President transmitted them. See *Floyd*, 499 U.S. at 549-550; *Saks*, 470 U.S. at 403. Indeed, until June 1998, Montreal Protocol No. 4 had not taken effect in any country because, by its terms, the Protocol does not enter into force until after 30 signatories have deposited their instruments of ratification with the Government of Poland. See Montreal Protocol No. 4, Art. XVIII.

We have been informed that on June 14, 1998, after the 30-nation condition was finally met, Montreal Protocol No. 4 entered into force in the countries that had ratified it. Subsequently, on June 23, 1998, the Senate Foreign Relations Committee voted to order that Montreal Protocol No. 4 be reported favorably to the full Senate. See 144 Cong. Rec. D685 (daily ed.). We have been further informed that the completion of the Committee's official report recommending ratification is expected in the near future.

Among other provisions (see generally Transmittal Letter v-viii), Montreal Protocol No. 4 would amend Article 24 of the Warsaw Convention to read: "*In the carriage of passengers and baggage*, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights." Montreal Protocol No. 4, Art. VIII (emphasis added). The Senate Foreign Relations Committee has previously stated that similar language in the Guatemala City Protocol "makes clear" that the Convention's "conditions and limits" apply to any "actions for damages" sustained during the course of international air travel. S. Exec. Rep. No. 21, 101st Cong., 2d Sess. 15 (1990) (1990

Senate Report); accord S. Exec. Rep. No. 45, 97th Cong., 1st Sess. 12 (1981).[7]

SUMMARY OF ARGUMENT

Article 24 of the Warsaw Convention provides that, "[i]n the cases covered by article 17," "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Those "conditions and limits" include the substantive conditions for personal injury liability set forth in Article 17 itself. The "exclusivity" question presented here—whether the Convention precludes suits under local law where a passenger *cannot* meet those substantive liability conditions—thus

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[7] The Guatemala City Protocol, which was largely incorporated by Montreal Protocol No. 3 (see 1990 Senate Report at 12), provides: "In the carriage of passengers and baggage any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights." *Id.* at 35. If *both* Montreal Protocols were ratified, as the 1990 Senate Report had conditionally recommended, that language, like other "provisions * * * concerning passengers and baggage," would have prevailed over the slightly different language of Montreal Protocol No. 4. See Montreal Protocol No. 4, Art. XXIV(b). In its most recent action, however, the Foreign Relations Committee has recommended that the Senate ratify only Montreal Protocol No. 4. (We have been informed that, like the Guatemala City Protocol, Montreal Protocol No. 3 has not entered into force in any country.) We have found no indication that the differences in language between the Guatemala City Protocol and Montreal Protocol No. 4 were intended to have any bearing on the issue presented here. Finally, Montreal Protocol No. 4, unlike the Guatemala City Protocol (see *Floyd*, 499 U.S. at 549-550), makes no amendment to Article 17.

turns on the meaning of Article 24(2)'s introductory clause: in the governing French (see *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 225 n.3 (1996)), "[d]ans les cas prévus à l'article 17." Literally translated, that clause means "in the circumstances anticipated [or 'foreseen'] in Article 17." The court of appeals narrowly construed that language to denote only those cases in which a plaintiff can in fact satisfy the liability conditions of Article 17. Under that interpretation, if a plaintiff cannot satisfy Article 17's liability conditions, she may, for that reason alone, bring suit under local law to evade *all* of the "conditions and limits set out in this convention."

That view of Article 24 is incorrect, as the British House of Lords held in *Abnett* v. *British Airways PLC*, 1 All E.R. 193 (1996) (reprinted at Pet. App. 34a-65a). Article 24(2) refers to Article 17 simply as a shorthand to denote the class of all cases involving personal injuries to passengers (which Article 17 comprehensively "anticipates") and to distinguish those cases from cases involving damaged baggage or delay, to which Article 24(1) refers with the parallel phrase "les cas prévus aux articles 18 et 19." Article 24(2) thus provides that Article 17 sets forth the exclusive conditions under which a carrier can be subjected to liability for personal injuries suffered by a passenger in the course of international air travel. Unlike the court of appeals' approach, that interpretation of Article 24 respects the Convention's overriding objective, expressed in the preamble, of "regulating in a uniform manner the conditions of international transportation by air in respect of * * * the liability of the carrier." And both the negotiating history of the Convention and the postratification understanding of the contracting parties (see gener-

ally *Zicherman*, 516 U.S. at 226) support the same interpretation.

As previously discussed, after this Court had granted certiorari, the Senate Foreign Relations Committee ordered that Montreal Protocol No. 4, which has remained in the Senate since President Ford first transmitted it in January 1977, be favorably reported to the full Senate. Among other things, the Protocol would amend the introductory clause at issue here ("[i]n the cases covered by article 17") to read: "[i]n the carriage of passengers and baggage." Where ratification has made it applicable, the Protocol would resolve, at least on a prospective basis, any doubt about the Convention's broad exclusivity in personal injury matters. At the same time, ratification of the Protocol by the United States would diminish the continuing legal significance of a decision in this case. We will keep the Court apprised of further developments concerning ratification of the Protocol.

ARGUMENT

THE WARSAW CONVENTION BARS SUITS UNDER LOCAL LAW FOR PERSONAL INJURIES THAT ARISE WITHIN THE COURSE OF INTERNATIONAL AIR TRAVEL BUT DO NOT MEET THE CONVENTION'S CONDITIONS FOR LIABILITY

The parties and the courts below have based their analysis of this case on the Warsaw Convention in its original form, which (as of the filing of this brief) remains in force in the United States. As discussed in Point A below, the Convention, even in that original form, bars this state law action because respondent cannot satisfy the Convention's own liability conditions. Moreover, any doubt about the Convention's exclusivity would be decisively resolved, at

least as to future cases, by Montreal Protocol No. 4, if it is ratified by the United States. In Point B below, we discuss how ratification of the Protocol could affect the proper disposition of this case.

A. The Convention Forecloses Respondent's State Law Damages Action.

The task of interpreting a treaty "begin[s] with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 534 (1991) (internal quotation marks omitted). It is inappropriate, however, to expect multilateral treaties, negotiated and drafted by numerous international delegates, to meet the standards of linguistic precision applicable to private contracts and domestic statutes. For that reason, "treaties are construed more liberally than private agreements, and to ascertain their meaning [the Court] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Id.* at 535; see also *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

1. The Convention is divided into several chapters, two of which are at issue here: Chapter I (Arts. 1-2), entitled "Scope—Definitions," and Chapter III (Arts. 17-30), entitled "Liability of the Carrier." As their titles suggest, Chapter I defines the scope of the Convention, and Chapter III defines the circumstances, within that scope, in which the Convention makes a carrier liable for various harms.

The central scope provision of Chapter I—Article 1(1)—provides that "[t]his convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft," either "for hire" or "gratuitous[ly]." That is general language, and other

provisions of the Convention clarify, for different contexts, when a person or item of baggage is within "international transportation * * * by aircraft" for purposes of Article 1(1). In particular, Article 17 makes clear that, in the specific context of suits for personal injury, the Convention addresses a carrier's liability to "passenger[s]" for harms occurring "on board the aircraft or in the course of any of the operations of embarking or disembarking." See generally *Air France* v. *Saks*, 470 U.S. 392, 401-402 (1985).[8] Because the Convention's preemptive effect on local law extends no further than the Convention's own substantive scope, a carrier is indisputably subject to liability under local law for injuries arising outside of that scope: *e.g.*, for passenger injuries occurring before "any of the operations of embarking." Cf. Pet. App. 20a-21a (expressing concern that wrongdoers not escape liability for accidents on airport escalators).

The question presented here, however, is whether a carrier may be found liable under local law for personal injury arising *within* the scope of the Convention—during "international transportation of persons * * * by aircraft" (Art. 1(1))—if the injured passenger cannot satisfy the substantive conditions for liability under the Convention itself. Article 17

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[8] Similarly, Article 18 provides that, as to baggage and goods, transportation by air generally "comprise[s] the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft," but "shall not extend to any transportation by land, by sea, or by river performed outside an airport," except in certain limited circumstances. Art. 18(2). As discussed below (pp. 25-26 and note 16), the delegates split Articles 17 and 18 into separate provisions in part because Article 1(1)'s scope provision needed to be clarified in two different ways in the two distinct contexts addressed by Articles 17 and 18.

sets forth two such conditions. First, the event causing the plaintiff's injury must have been an "accident" in the specialized sense applicable here: it must have been both "unexpected or unusual" and "external to the passenger." *Saks*, 470 U.S. at 405 (hearing loss caused by normal loss of cabin pressure does not qualify as "accident"); see also note 11, *infra*. Second, the harm itself must take the form of "death or * * * bodily injury." See *Floyd*, *supra* (Article 17 does not create cause of action for mental anguish caused by narrowly averted crash). This Court has twice declined to address whether a plaintiff, unable to satisfy one or the other of those liability conditions, may nonetheless bring a cause of action under state law. See *Saks*, 470 U.S. at 408; *Floyd*, 499 U.S. at 553.

This case squarely presents that question of exclusivity. The parties and courts below have all assumed—correctly, we believe—that the security search in question, although conducted in an airport terminal building before the flight, occurred in "international transportation" (Art. 1(1)): that is, "in the course of any of the operations of embarking or disembarking" (Art. 17). See, *e.g.*, Pet. App. 14a.[9] It is

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[9] In determining whether a plaintiff was injured during operations of embarkation, the courts of appeals focus on the plaintiff's location and activity and on the extent to which the airline exercised control over the plaintiff at the time the injury occurred. See, *e.g.*, *Schroeder* v. *Lufthansa German Airlines, Inc.*, 875 F.2d 613, 617 (7th Cir. 1989); *Evangelinos* v. *Trans World Airlines, Inc.*, 550 F.2d 152, 155 (3d Cir. 1977) (en banc); *Martinez Hernandez* v. *Air France*, 545 F.2d 279, 282 (1st Cir. 1976), cert. denied, 430 U.S. 950 (1977); *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 33 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976). Cf. *Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256, 1262 (9th Cir.) (applying slightly different "total[ity of the] circumstances" test), cert. denied,

therefore undisputed that, in that respect, the events at issue fall within the scope of the Convention.[10]

It is also undisputed that respondent could not meet the conditions for liability set forth in Article 17. The court of appeals reached that conclusion on the ground that the search in question was not an "accident" within the meaning of Article 17. See Pet. App. 14a. Although petitioner had urged the court of appeals to affirm the district court's finding that the search was in fact an "accident," petitioner conceded at the petition stage, for purposes of this Court's review, that the court of appeals' disposition of that threshold issue was correct (see Pet. i (questions presented), 7), and respondent agreed (see Br. in Opp. 13). We believe that it would be appropriate for this Court to accept the parties' agreement on that issue.[11]

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431 U.S. 974 (1977). The security search at issue here would appear to satisfy those tests.

[10] Article 25 of the Warsaw Convention provides that "willful misconduct" disqualifies a carrier from availing itself "of the provisions of this convention which exclude or limit [its] liability." (If ratified, Montreal Protocol No. 4 would substantially amend Article 25. See note 11, *infra*.) In both the district court and the court of appeals, respondent relied on Article 25 as a basis for "tak[ing] the case outside the Convention's limitations of liability." Pet. App. 27a. As we noted in our amicus brief at the petition stage (at 12-13), Article 25 is not at issue in this case. After trial, the district court specifically found, as a factual matter, that petitioner's actions were not willful, Pet. App. 27a, and respondent did not properly preserve any challenge to that finding either in the court of appeals or in her brief in opposition to certiorari (which does not even cite Article 25). See Sup. Ct. R. 15.2.

[11] The definition of "accident" has been "flexibly applied" in this context to include not just inadvertent harms, but reckless and even intentional torts as well, such as "torts committed by terrorists." *Saks*, 470 U.S. at 405. The term is often given

But even if there were some basis for uncertainty about the proper characterization of this search, cf. *Saks*, 470 U.S. at 405, this case would still present the core question of the Convention's exclusivity. That is so because respondent's claim fails to meet an independent condition for liability under Article 17: she has not alleged that she suffered a "bodily injury" within the meaning of that provision. See Tseng C.A. Br. 16, 19, 20, 24; see also Br. in Opp. 4.[12]

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a similarly expansive meaning in the context of insurance law: "In the absence of a policy provision on the subject, there is much support for the view that injury or death intentionally inflicted by a third person upon the insured is nevertheless due to accident or accidental means where it was neither foreseen, expected, nor anticipated *by the insured*." F. Tinio, *Accident Insurance: Death or Injury Intentionally Inflicted by Another as Due to Accident or Accidental Means*, 49 A.L.R.3d 673, 678 (1973) (emphasis added; footnotes omitted). The expansive scope of the term "accident" is one answer to the court of appeals' concern (Pet. App. 20a) that carriers not escape liability for their intentional torts. See also *id.* at 64a-65a (*Abnett* decision); cf. Warsaw Convention, Art. 25(1) ("[t]he carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability," if the carrier or its agent, acting within the scope of his employment, acts with "willful misconduct"); Montreal Protocol No. 4, Arts. IX, X (amending Article 25 to provide that "the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."); note 10, *supra* (discussing Article 25).

[12] Disputes about the Convention's exclusivity arise most commonly in cases (such as *Saks*) in which the plaintiff has suffered physical injuries but the cause of those injuries was not an "accident," rather than in cases (such as *Floyd*) in which the plaintiff's injuries *were* caused by an "accident" but are not

2. Article 24 governs the ultimate legal dispute in this case: whether a passenger's failure to meet the liability conditions of Article 17 precludes recovery under local law for events falling within "international transportation * * * by aircraft" (Art. 1(1)). Read together, the two paragraphs of Article 24 provide that, "[i]n the cases covered by article 17," "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Cf. p. 5, *supra* (discussing final clause of Article 24(2)). In other words, "[i]n the cases covered by article 17," an injured passenger may sue an airline for personal injury only if she meets all of the various "conditions" of, and "limits" on, liability set forth in the Convention. The central question is the meaning of the phrase that triggers Article 24's preemptive effect: "cases covered by article 17."

In the governing French text (see *Zicherman*, 516 U.S. at 225 n.3), that phrase reads, "[d]ans les cas prévus à l'article 17," which, literally translated, means "in the circumstances anticipated [or 'foreseen'] in Article 17." See *Cassell's New French Dictionary* 130, 565-566 (5th ed. 1951). There are two

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"bodily" in character. In our view, however, the ultimate answer to the exclusivity question should be the same in both situations. Either the Convention permits liability under local law if the "accident" and "bodily injury" conditions for liability under Article 17 are unmet, or it does not; there is no persuasive reason why the answer to that question should turn on *which* of those conditions is unmet. But cf. Pet. App. 27a-28a (seeming to assume that Convention "applies," and is given preemptive effect, if and only if injury-causing event qualifies as an "accident"); *Krys* v. *Lufthansa German Airlines*, 119 F.3d 1515, 1518 n.8 (11th Cir. 1997) (similar), cert. denied, 118 S. Ct. 1042 (1998).

ways to interpret that phrase. In respondent's view, and in the view of the court of appeals, the phrase narrowly denotes the cases in which the plaintiff could actually bring a cause of action under Article 17. Under that approach, a plaintiff who could *not* satisfy the liability conditions of Article 17 could nonetheless bring a cause of action under local law, and—precisely because she could not satisfy Article 17's conditions—she would be free of *all* of the "conditions and limits set out in this convention."

Under the alternative interpretation, the phrase "les cas prévus à l'article 17" serves as a shorthand for personal injury cases in general—which Article 17 addresses (or "anticipates") comprehensively—and distinguishes that class of cases from cases involving damaged or lost luggage and delay, to which Article 24(1) refers with the parallel phrase "les cas prévus aux articles 18 et 19" (see *Zicherman*, 516 U.S. at 225 n.3). That is the interpretation adopted by the British House of Lords at *Abnett* v. *British Airways PLC*, *supra* (reprinted at Pet. App. 34a-65a). See also M. Milde, *The Problems of Liabilities in International Carriage By Air* 55-56 (A. Kafka trans. 1969). Under that interpretation, *any* personal injury action brought by a passenger against a carrier for events arising in international air travel would be "subject to the conditions and limits of this convention." Because those "conditions" and "limits" include Article 17's substantive conditions for carrier liability, see *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1488-1489 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991), that interpretation of Article 24 would preclude suits under local law where those conditions are unmet—*e.g.*, where the passenger suffered no "bodily injury," see *Floyd*, *supra*, or

where the injury did not arise from an "accident," see *Saks*, *supra*. For several reasons, we believe that this is the more faithful reading of the Convention.

First, this reading is consistent with the Convention's explicit textual insistence on international uniformity in the legal principles defining the circumstances under which a carrier will be exposed to liability.[13] Indeed, the first substantive sentence of the Convention, contained in the preamble, emphasizes the necessity of "regulating in a uniform manner the conditions of international transportation by air in respect of * * * the liability of the carrier." To achieve such uniformity, the Convention establishes a comprehensive set of legal principles governing the three major categories of liability (including personal injury) associated with international air travel, and it declares that those principles, along with the rest of the Convention, "shall apply to all international transportation of persons, baggage, or goods performed by aircraft." Art. 1(1); see also *Minutes*, *supra*, at 213 (remarks of British delegate) (Article 24 "touches the very substance of the Convention, because [it] excludes recourse to common law"); G.N. Calkins, *The Cause of Action Under the Warsaw Convention, Part I*, 26 J. Air L. & Com. 217, 227 (1959) ("the evidence is overwhelming that the conference reaffirmed the theory throughout that the convention would establish a system of liability complete in itself"). It is most unlikely that, despite those textual aspirations to legal uniformity, the Convention was intended to subject carriers to radically *non*-uniform liability under the peculiar legal regimes of

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[13] As noted on p. 5 above, those principles are distinct from the remedial issues that the delegates expressly left for resolution under domestic law. See *Zicherman*, 516 U.S. at 230-231.

the various signatories for injuries incurred during international air travel.[14]

Second, the structure of the Convention is far more consistent with a broad view of Article 24 than with the court of appeals' interpretation. One provision illustrating that point is Article 23, which generally invalidates "[a]ny provision [in a travel contract] tending to relieve the carrier of liability" to passengers. Cf. note 5, *supra*. By its terms, that provision appears applicable to any provision relieving carriers of *any* kind of liability to which they might be subject after ratification of the Convention. But the delegates' intricate compromise between the interests of passengers and the interests of carriers (see pp. 3-5, *supra*) would be defeated if the Convention were construed not only to bar a carrier from contracting out of its *limited* liability under the Convention itself, but also to perpetuate its exposure

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[14] The court of appeals erroneously sought support for its contrary position in the fact that the delegates amended the formal title of the Convention "to refer to the unification of '*certain rules*,'" rather than all rules, relating to international transportation by air. Pet. App. 16a-17a. As the House of Lords aptly observed in *Abnett*, however, it is undisputed, and immaterial to the present analysis, that "the Convention is concerned with certain rules only, not with all the rules relating to international carriage by air. * * * Nothing is said in this Convention about the liability of passengers to the carrier, for example. Nor is anything said about the carrier's obligations of insurance, and in particular about compulsory insurance against third party risks." *Id.* at 50a. The question presented here, however, is whether the Convention "unifies the rules" governing a subject that it *does* address: a carrier's liability to passengers for personal injury.

to *unlimited* liability under local law and to prevent it from contracting out of that liability as well.[15]

That the court of appeals' approach would produce such an asymmetric result strongly suggests that the delegates intended for Article 17 to speak comprehensively to the subject of a carrier's liability to passengers for personal injuries arising in international air travel. As the House of Lords concluded in *Abnett*, those delegates did not intend for the courts of the various signatories to "set[] alongside the Convention * * * an entirely different set of rules which would distort the operation of the whole scheme." Pet. App. 65a; see also *id.* at 53a-56a (noting other anomalies). That view of the House of Lords, as the final legal position of a sister signatory, is "entitled to considerable weight." *Saks*, 470 U.S. at 404.

Third, the drafting history of the Convention also supports a broad view of Article 24. See generally *Zicherman*, 516 U.S. at 226 (reaffirming role of negotiating history in interpretation of treaties). The question of Article 17's exclusivity typically arises in cases in which the event causing a passenger's injury was not an "accident"—in the broad sense applicable in this specialized context—because it was not "unexpected or unusual" and "external to the passenger." *Saks*, 470 U.S. at 405. The addition of the "accident"

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[15] The court of appeals reasoned that the Convention was designed to protect carriers only against potentially ruinous liability for "catastrophic incident[s]." Pet. App. 20a. But the Convention draws no distinction between "catastrophic" and "non-catastrophic" incidents. Indeed, by addressing a carrier's liability for damages due to delay (see Articles 19 and 24), the Convention makes clear that it sets forth a comprehensive system of liability for travel-related harms of all kinds, whether catastrophic or not. See also *Minutes*, *supra*, at 54-58 (discussing need for provision imposing liability for delay).

requirement came late in the drafting process; in the penultimate draft, all sources of carrier liability were grouped in a single Article, which, *inter alia*, made a carrier liable "in the case of death, wounding, or any other bodily injury suffered by a traveler." *Minutes*, *supra*, at 264-265 (quoted in *Saks*, 470 U.S. at 401); see also *id.* at 205-206. That Article was split in three, and recast into what are now Articles 17, 18, and 19, "primarily because delegates thought that liability for baggage should commence upon delivery to the carrier, whereas liability for passengers should commence when the passengers later embark upon the aircraft." *Saks*, 470 U.S. at 402; see also *Minutes*, *supra*, at 212-213, 229 (noting need to split Article 24 into separate subsections to accommodate creation of separate Articles 17, 18, and 19).

In adding the final clause of what is now Article 17 —"if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking"—the delegates accomplished two basic objectives: first, they clarified that carriers would be liable for injuries that were triggered by events occurring during (or around the time of) the flight but did not become manifest until later, see *Minutes*, *supra*, at 166-167,[16] and, second, they ensured that carriers would be liable only for events properly characterized as "accident[s]," see *Saks*, 470 U.S. at 405. In securing the latter objective, the delegates sought, of course, to confine the scope of a carrier's liability under the Convention. We have found nothing in the

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[16] See also *Minutes*, *supra*, at 80-84 (discussing need to distinguish harm to passengers from harm to baggage in fixing point in travel at which events could subject carrier to liability).

Convention's drafting history to suggest that the delegates intended, at the same time, to *expand* the scope of a carrier's unlimited liability under local law. But that would be the obvious (and very significant) consequence of their drafting change if the court of appeals' interpretation of the Convention's exclusivity provision were correct. The delegates' failure to endorse that consequence—or even to acknowledge it—suggests that the court of appeals' interpretation is not correct, and that the Convention bars actions under local law where a plaintiff could not satisfy Article 17's liability conditions.[17]

A similar conclusion follows from the substance of several formal proposals to amend the Warsaw Convention. "Because a treaty ratified by the United States is not only the law of this land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers, [this Court has] traditionally considered as [an] aid[ ] to its interpretation * * * the postratification understanding of the contracting parties." *Zicherman*, 516 U.S. at 226. As discussed above (pp. 11-12 and note 7), Montreal Protocol No. 4, like the Guatemala City Protocol and Montreal Protocol No. 3, would replace the current introductory clause of Article 24(2) at issue here ("[i]n the cases covered by Article 17") with the phrase "[i]n the carriage of passengers and baggage."[18] The chief pur-

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[17] As observed in note 2 above, many international carriers voluntarily agreed in 1996 to waive the treaty-based limit on exposure to compensatory (though not punitive) liability. Such private agreements do not, of course, "purport to change or clarify the provisions of Article 17," and they "do[ ] not and cannot purport to speak for the signatories" to the Warsaw Convention. *Floyd*, 499 U.S. at 549.

[18] The Guatemala City Protocol, largely incorporated by Montreal Protocol No. 3, would have extended the liability

pose of that change is simply to distinguish cases involving harm to "passengers and baggage" from those involving harm to "cargo," to which different liability standards would apply. See, *e.g.*, Montreal Protocol No.4, Art. VIII; see also Guatemala City Protocol, Art. IX. At the same time, the proposed change in the introductory clause also makes abundantly clear that the Convention's "conditions" for, and "limits" on, liability apply to *all* suits by passengers for personal injuries arising in the course of international air travel, not just those in which the plaintiff could in fact satisfy the liability conditions of Article 17. See pp. 11-12, *supra*.

We have found no indication that the amendment to the introductory clause was designed to *alter* the Convention's preemptive effect on personal injury actions under local law.[19] That, however, would be the quite consequential effect of the proposed change *if* the court below were correct in believing that Article 24(2)'s original introductory clause ("[i]n the cases

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provision of Article 17 to any "event which caused the death or injury" of a passenger, provided that the death or injury did not result "solely from the state of health of the passenger." See *Saks*, 470 U.S. at 403-404. Montreal Protocol No. 4, by contrast, contains no amendment to Article 17.

[19] The present version of the proposed new introductory clause emerged in the drafting of the Guatemala City Protocol. At their ninth meeting, held on March 5, 1971, the delegates replaced the interim language "In the cases covered by Article 17 and in cases of delay of passengers and baggage" with "In the carriage of passengers and baggage." See 1 International Civil Aviation Org., *International Conference on Air Law, Guatemala City, Feb.-Mar. 1971* (Minutes) 301; 2 International Civil Aviation Org., *International Conference on Air Law, Guatemala City, Feb.-Mar. 1971* (Documents) 172. There was no objection to that change, proposed by the Irish and Swedish delegates, and it was adopted without substantive discussion.

covered by Article 17") confined the Convention's preemptive effect to cases in which a plaintiff could satisfy the liability conditions of Article 17. The noncontroversial removal of that original clause in the drafting of the subsequent protocols suggests that the decision below is *not* correct; that the clause has not been understood to confine the Convention's preemptive effect to cases in which Article 17's liability criteria are met; and that the clause is instead interchangeable with, and substantively identical to, the proposed new language that would replace it. That conclusion would be fortified by, but is not ultimately dependent upon, ratification by the United States of Montreal Protocol No. 4, which has now entered into force in the numerous other countries that have ratified it.

B. Ratification of Montreal Protocol No. 4 By The United States Could Affect The Court's Consideration Of This Case

After this Court granted certiorari, Montreal Protocol No. 4 entered into force on June 1998 in the countries that had ratified it, and, shortly thereafter, the Senate Foreign Relations Committee voted to report the Protocol to the full Senate for its consideration. See pp. 10-11, *supra*. As of the filing of this brief, the Senate had not yet taken action on the matter.

As we advised this Court in our letter of July 1, 1998 (see note 5, *supra*), ratification of Montreal Protocol No. 4 by the United States could substantially affect the Court's consideration of this case. First, where ratification has made the Protocol applicable to a given case (see, *e.g.*, Montreal Protocol No. 4, Art. XIV), the Protocol supersedes Article 24(2)'s original introductory clause, which is the

proper focus of this dispute. Ratification of Montreal Protocol No. 4 by the United States would thus diminish the continuing legal significance of any resolution of this dispute.[20] At the same time, such ratification, combined with the Protocol's recent entry into force elsewhere, might itself be relevant to a proper interpretation of Article 24's original text. See pp. 26-28, *supra*; see generally *Zicherman*, 516 U.S. at 226 (affirming importance of "the postratification understanding of the contracting parties" in treaty interpretation); cf. *Floyd*, 499 U.S. at 550 ("because the United States Senate has not ratified the [Guatemala City] Protocol we should not consider it to be dispositive"); *Saks*, 470 U.S. at 403 (because the Montreal and Guatemala City Protocols "have yet to be ratified by the Senate," they "do not govern the disposition of this case"). We will keep the Court apprised of further developments with respect to the ratification of Montreal Protocol No. 4.[21]

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[20] Whether the Protocol has retroactive application is an issue that this Court would not normally address in the first instance.

[21] Airport security searches like the one at issue here are subject to a detailed federal regulatory scheme administered by the Department of Transportation. See 49 U.S.C. 44901 *et seq.*; 14 C.F.R. Pts. 107, 108. Because this Court granted certiorari to review only the question of the Warsaw Convention's exclusivity, there is no occasion to address whether that regulatory scheme preempts state law tort actions arising from such security searches.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it holds that respondent's personal injury claim may proceed under state law even if she cannot satisfy the conditions for liability under the Convention.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,
Petitioner,
v.
TSUI YUAN TSENG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF AIR TRANSPORT ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-475

EL AL ISRAEL AIRLINES, LTD.,
Petitioner,

v.

TSUI YUAN TSENG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Air Transport Association of America (ATA) respectfully moves to file the attached brief *amicus curiae* in support of the petition to reverse the judgment of the U.S. Court of Appeals for the Second Circuit. Counsel for Petitioner has given their consent for the ATA to file this brief, and verification of that consent has been filed with the Court. The consent of Counsel for Respondent was requested and refused despite being granted at the petition stage. This Court previously granted the ATA's motion for leave to file a Brief as *amicus curiae*. 118 S. Ct. 1793 (May 18, 1998).

The interest of the ATA in this case stems from the fact that its member airlines consider this case to present issues of national and international importance. As set forth more fully in the attached brief, the decision below undermines the continued viability of the Warsaw Convention and profoundly affects the ability of the ATA's members to implement security measures that assure the safety of 50 million passengers carried annually on international flights by the ATA member airlines.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Warsaw Convention, a treaty of the United States, exclusively governs and precludes any recovery for a passenger's injuries sustained in the course of "international transportation" if the injuries were not caused by an "accident" within the meaning of Article 17 of the Convention?

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BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Air Transport Association of America (ATA), as *amicus curiae*, supports the Petition of El Al Israel Airlines, Ltd. (El Al) to reverse the judgment of the U.S. Court of Appeals for the Second Circuit.[1]

INTEREST OF THE AIR TRANSPORT ASSOCIATION OF AMERICA

The ATA is an association of 23 U.S. and five foreign airlines.[2] The ATA's U.S. members operate within the

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[1] No party to this case had any role in drafting this brief or provided any monetary support for its preparation or filing. Supreme Court Rule 37.6.

[2] The ATA's members are Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, Ameri-

United States and in the U.S. foreign commerce. Its foreign members also participate in the U.S. foreign commerce and are subject to suit in the United States. The ATA's principal purpose is to support its member airlines by promoting airline safety and advocating common industry positions. Since its inception in 1936, the ATA has been involved in the development of international law governing international air transportation.

The decision below threatens to upset the established expectations of airlines and their governments with respect to the uniformity and exclusivity of the international air transportation liability regime.

First, the ATA is concerned that the decision below puts the primacy of the Warsaw Convention's liability regime at risk by undermining the realization of its principal objective—uniformity. The decision threatens to subject passengers and airlines to different remedies and standards of liability, depending on the country or the local jurisdiction in which the suit is filed. Further, the decision contradicts the uniform implementation of the Convention's rules by airlines and their governments. Recently, the world's airlines, with strong U.S. government support, have achieved consensus to waive the Convention's passenger liability limits and certain of its defenses. ATA member airlines have already implemented waivers of passenger liability limits in their tariffs governing international air services. The decision below threatens the further implementation by foreign airlines of this important consensus.

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can Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International, Federal Express, Hawaiian Airlines, Midwest Express, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and US Airways. The ATA's technical, foreign-flag members are Aeromexico, Air Canada, Canadian Airlines International, KLM-Royal Dutch Airlines, and Mexicana Airlines.

Finally, by exposing airlines to liability under local law for applying statutorily required security procedures, the court's holding could have a chilling effect on airlines and their personnel in executing their security responsibilities. This would impair the ability of the United States to protect the safety and security of its citizens.

STATEMENT

Respondent seeks damages under New York state law for emotional injuries allegedly suffered during a routine airline security search conducted in the United States pursuant to El Al's security program. Respondent suffered no physical harm. El Al conducted the search in accordance with a security program to screen all passengers and baggage before boarding or loading.

The district court concluded that Respondent's injuries were caused by an "accident" within the meaning of Article 17 of the Warsaw Convention.[3] The district court found, however, that the injuries were not "bodily injuries" cognizable under Article 17 and that Article 24 of the Convention[4] precluded state law claims for injuries not compensable under Article 17.

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[3] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C. § 40105 note (1994). Article 17 of the Convention states:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

[4] Article 24 of the Convention states:

> (1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the

The court of appeals reversed, holding that a security search—being a common incident of international air travel, and not an "unexpected" or "unusual" event—is not an "accident" for purposes of the Warsaw Convention. Finding the conduct not "covered" by Article 17, the court of appeals held that Article 24 did not preempt the personal injury claims and that Respondent could pursue causes of action under state law unfettered by the Convention's liability limitations.

SUMMARY OF ARGUMENT

The parties to the Warsaw Convention intended to establish and maintain a uniform set of rules governing the liability of the carrier to passengers traveling in international air transportation. Nothing in this Convention's long history supports a different interpretation. The decision below directly disrupts the international airline industry's and the aeronautical authorities of governments' expectations that the Convention provides the exclusive means of passenger redress for injuries within its scope.

Subsequent amendments to the Convention confirm its objective of establishing an exclusive and uniform set of carrier liability rules for passengers in international air transportation. The Convention itself, which allows parties adhering to different versions of this treaty to nonetheless maintain a treaty relationship, underscores the need for consistency in its interpretation except where the parties clearly intend to effect a change in their obligations. In this case, it is inconceivable that the parties would seek to alter something so fundamental as the scope of the Convention's uniformity by a mere technical clarification to the language of Article 24.

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questions as to who are the persons who have the right to bring suit and what are their respective rights.

The holding of the court below contradicts the carriers' own rules implementing the Convention, as filed with the Department of Transportation (DOT) in tariffs. It also jeopardizes the consensus recently achieved by the major international air carriers to waive the Convention's passenger liability limits and certain defenses.

Declaring certain causes of action for injuries sustained in international air transportation to be outside the Convention's coverage would have serious adverse effects. It would disrupt the Convention's uniform liability regime and would interfere with airline activity undertaken pursuant to other international obligations governing international air transportation security—obligations negotiated with the shared expectation of the Convention's exclusivity.

The court of appeals' holding that the Warsaw Convention does not apply to certain passenger injury claims sustained during international air transportation is based upon the fundamentally erroneous premise that a Convention establishing exclusive liability rules cannot be read to preclude liability altogether in certain cases.

Finally, the court of appeals' decision directly conflicts with the decision of the U.K. House of Lords of the United Kingdom in *Abnett v. British Airways*.[5] The decision of a sister signatory to the Convention is entitled to considerable weight.[6]

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[5] 1 All E.R. 193 (H.L. 1996) (U.K.); Pet. App. 34a-65a.

[6] *Air France v. Saks*, 470 U.S. 392, 404 (1985).

ARGUMENT

I. THE HOLDING OF THE COURT OF APPEALS THAT THE WARSAW CONVENTION'S RULES ARE NOT EXCLUSIVE UNDERMINES THE UNIFORM LIABILITY REGIME OF THE CONVENTION.

In this case, the court of appeals held that the Warsaw Convention does not provide the exclusive remedy for personal injuries sustained in the course of international air transportation. Thus, according to the court of appeals, plaintiffs who allegedly suffer personal injuries, not involving physical harm, resulting from an airline's security search—a search mandated by both federal and international law—are free to sue under the law of any state unfettered by the liability rules agreed to by the United States in the Warsaw Convention.

The court of appeals' holding does substantial damage to the Convention and the uniform liability regime established under it. A principal purpose of the Warsaw Convention is to establish a system for "regulating in a uniform manner the conditions of international transportation by air in respect of . . . the liability of the carrier." [7] Accordingly, Article 1(1), which broadly defines the Convention's scope, provides that "[t]his Convention shall apply to *all* international transportation of persons, baggage, or goods performed by aircraft for hire." [8] In other words, the Convention's liability rules are exclusive for claims arising from "international air transportation" as defined in the Convention.

The court of appeals' decision ignores these fundamental principles. As set forth in the Brief of the United States as *amicus curiae*, the governing text, drafting history, and

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[7] Warsaw Convention, Preamble; *see Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 116 S. Ct. 629, 636 (1996).

[8] Warsaw Convention, Article 1(1) (emphasis added).

overall structure of the Convention confirm the exclusivity of the Convention.[9] The ATA will not address those issues further in this brief. Rather, because subsequent conduct of the Convention's parties and international airlines is relevant to the Convention's proper interpretation, the ATA will here set forth the developments following its ratification that further demonstrate its exclusivity. This brief will also discuss the serious practical implications that the court of appeals' decision will have on the Convention's liability regime, airlines, and the safety and security of airline passengers.

II. SUBSEQUENT AMENDMENTS TO THE CONVENTION CONFIRM THE EXCLUSIVITY OF ITS RULES.

In holding that the Convention does not provide the exclusive remedy for personal injuries sustained during international air transportation, the court of appeals focused on the language of Article 24, which provides "[i]n cases covered by Article 17" [10] an action for damages based on personal injury "can only be brought subject to the conditions and limits set out in this convention." [11] The court then reasoned that for a person to recover under Article 17, his or her personal injuries resulting from an "accident" must lead to bodily injury; any injuries that are neither bodily injuries nor caused by an "accident" are not "covered" by Article 17.[12] The court then concluded that because such injuries are not "covered" by Article 17, Article 24 does not apply, and a person sus-

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[9] Brief for the United States as *Amicus Curiae* on Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit at 13-19 (April 1998).

[10] Warsaw Convention, Article 24(2).

[11] *Id.*, Article 24(1).

[12] Pet. App. 15a-16a.

taining such injuries is free to seek whatever remedies are provided by municipal law.[13]

The Convention's amendments show that the court of appeals' reading of Article 24's exclusivity provisions does not conform with the "shared expectations of the contracting parties." [14] The 1971 Guatemala City Protocol to the Convention proposed to amend Articles 17, 22, 24, and 25 of the Convention to make the liability of the carrier absolute and its limits unbreakable.[15] Of particular relevance here, this Protocol proposed to amend the coverage of Article 24's exclusivity provision from cases "covered by Article 17" to provide for exclusivity with respect to "any action for damages, however founded" arising from "the carriage of passengers and baggage." [16] This change in language, however, was not intended as a substantive

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[13] *Id.*

[14] *Air France v. Saks*, 470 U.S. at 399.

[15] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, March 8, 1971. *See* R. Mankewitz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. AIR L. COM. 519 (1972). The ATA recognizes that this Court has cautioned against attaching significance to the Guatemala City Protocol. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991). As explained *infra* nn.24-26 and accompanying text, however, Montreal Protocol No. 4's recent entry into force makes it relevant.

[16] Article IX of the Guatemala City Protocol would have amended Article 24(2) of the Convention to read:

> In the carriage of passengers and baggage any action for damages, however founded, whether under this convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights . . . .

change in the Convention's coverage, but rather as a reorganization of Article 24's paragraphs.[17]

Although it never entered into force,[18] the Guatemala City Protocol has been incorporated into Montreal Protocols Nos. 3 [19] and 4.[20] In particular, Montreal Protocol No. 3 (which deals primarily with passenger liability) would have amended Article 24, using the identical language contained in Article IX of the Guatemala City Protocol. Montreal Protocol No. 4 (which deals primarily with cargo liability) nonetheless amends the language of Article 24 with language derived from the Guatemala City Protocol. As with the Guatemala City Protocol, there is no suggestion in the negotiating history with respect to the Montreal Protocols that this was intended to effect a substantive change in the Convention's exclusivity. Indeed, the negotiating history of Montreal Protocol No 4

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[17] ICAO, INTERNATIONAL CONFERENCE ON AIR LAW, GUATEMALA CITY, ICAO Doc. 9040-LC/167-1, at 301 (1972).

[18] For the Protocol to enter into force and become binding, it must be approved by 30 signatories to the Convention, which represent at least 40 percent of the total international scheduled air traffic. *See* Article XX. The Protocol has never been transmitted to the United States Senate for its advice and consent to ratification. Its status in the United States and the international community is largely irrelevant in light of Montreal Protocol Nos. 3 and 4.

[19] Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocols Done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971, Art. VII, September 25, 1975.

[20] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, September 25, 1975.

suggests that this change was uncontroversial since it was approved unanimously.[21]

In 1977, the Montreal Protocols were submitted to the Senate for advice and consent to ratification. They were favorably reported to the Senate by the Senate Foreign Relations Committee on three separate occasions.[22] In so reporting the committee confirmed that, with respect to the Convention's exclusivity, the amendment to Article 24's language was intended to clarify the existing provision, stating that Article 24 "makes clear that actions for damages whether founded upon the 'Convention, or in contract or tort or otherwise' can only be brought subject to the conditions and limits set out in the Convention." [23]

On June 14, 1998, Montreal Protocol No. 4 entered into force for the 30 countries that had ratified it.[24] For those countries Article 24, as it relates to passenger claims, reads as follows:

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21 ICAO, INTERNATIONAL CONFERENCE ON AIR LAW, MONTREAL, ICAO Doc. 9154-LC/174-1, at 167 (1975).

22 The Senate's failure to give its advice and consent to ratification of both Protocols was attributable primarily to "a reluctance to accept any damage limitations [on passenger claims] at all." *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1475 n.19 (11th Cir. 1989), *cert. granted*, 496 U.S. 904 (1990), *rev'd on other grounds*, 499 U.S. 530 (1991); *see also* S. REP. No. 101-21, at 21 (Minority views of Senators Biden and Simon). On June 23, 1998, the Senate Foreign Relations Committee voted unanimously to report Montreal Protocol No. 4 favorably for Senate advice and consent to ratification. *See* 144 CONG. REC. D685 (daily ed. June 23, 1998). The committee has not yet issued a report to accompany its recommendation. The Senate is expected to direct the Secretary of the Senate to return Montreal Additional Protocol No. 3 to the President.

23 S. REP. No. 97-45, at 12 (1981); S. REP. No. 98-1, Executive B, at 17 (1983); S. REP. No. 101-21, at 15 (1990).

24 The treaty entered into force 30 days after the thirtieth signatory deposited its instrument of ratification with the Polish government under Article XVIII.

> In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.[25]

Notwithstanding the differences in the texts of Article 24, the United States remains in a treaty relationship under the Convention with all 30 countries party to Montreal Protocol No. 4.[26] A holding that the changes to Article 24 are more than a drafting clarification would result in vastly different liability rules being applied to passengers on a single flight: the rules depending on the country in which an action for damages is filed. Such a result would eviscerate the Convention's uniformity and therefore should be embraced only where the parties clearly intended such a result. That is not the case here.

III. THE AIRLINES AND THE UNITED STATES HAVE IMPLEMENTED THE CONVENTION'S RULES IN A MANNER CONSISTENT WITH THEIR EXCLUSIVITY.

A. Air Carrier Tariffs Filed with the Department of Transportation Reflect the Exclusivity of the Convention's Rules.

Under the terms of the Chicago Convention, scheduled international air transport services require the mutual con-

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[25] Once the United States ratifies Montreal Protocol No. 4, the amended Article 24 will govern actions in the United States arising from the injury to, or the death of, a passenger in international carriage, provided that the carriage involves a place of departure and destination within the territory of a party to the amended Convention. *See* Montreal Protocol No. 4, Article XIV. Hence, a round trip ticket originating in the United States will be governed by the amended Article 24 after Montreal Protocol No. 4 is ratified by the United States. *See, e.g., Swaminathan v. Swiss Air Transport Co.*, 962 F.2d 387, 389 (5th Cir. 1992).

[26] *In re Korean Air Lines Disaster*, 664 F. Supp. 1463, 1469 (D.D.C. 1985).

sent of the nations between whose territories passengers are carried.[27] For this reason among others, international air transportation is subject to pervasive economic and safety regulations, the terms of which are governed by bilateral air services agreements.[28]

U.S. law authorizes DOT to require that tariffs contain the contract of carriage.[29] DOT regulations require that, unless a carrier elects to assume unlimited liability, its tariffs must contain a statement as to the applicability and effect of the Warsaw Convention.[30]

Carrier tariffs typically contain two sets of liability rules: one for international transportation as defined in Article 1(2) of the Warsaw Convention, and another for international transportation that does not fit that definition.[31] With respect to international transportation as defined in the Convention, DOT requires carriers serving the United States to include a waiver of the Convention's $10,000 passenger liability limit, by becoming a party either to (a) the 1966 Montreal Agreement, under which the carrier agrees to waive the limit and the defense of non-negligence up to $75,000,[32] or (b) one of the 1996 inter-

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[27] Convention on International Civil Aviation, December 7, 1944, art. 6, 61 Stat. 1180, 1182, 15 U.N.T.S. 295.

[28] *See, e.g.*, Air Services Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, July 23, 1977, 28 U.S.T. 5367, TIAS 7537.

[29] 49 U.S.C. § 41504(a)(1)(A).

[30] 14 C.F.R. § 221.38(j).

[31] An example of international air transportation that does not fit within the Convention's definition of that term is transportation between countries that are not party to the Convention.

[32] Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, CAB Agreement 18900, 31 Fed. Reg. 7302 (1966) (approved by Civil Aeronautics Board (CAB) Order No. E-23680, May 13, 1966). *See, e.g.*, 14 C.F.R. Part 203.

carrier agreements [33] under which the carrier agrees to waive the liability limit altogether, while retaining the defense of non-negligence with respect to that portion of the claim that does not exceed 100,000 Special Drawing Rights (SDRs).[34]

The 1966 Montreal Agreement, which has been included in carriers' tariffs for over 30 years, is predicated on the Convention's exclusivity. The Montreal Agreement (which was approved by the CAB) specifically states that it is to apply "to all international transportation by the Carrier as defined in the said Convention." [35] Pursuant to the CAB's rulemaking authority,[36] the terms of this agreement were incorporated into the regulations since they were consistent with the Warsaw Convention. The regulations require carriers to file their adherence to the Montreal Agreement as part of their tariffs.[37]

Pursuant to long-standing industry practice, U.S. and foreign carriers harmonize their conditions of carriage, particularly with regard to liability, to promote interlining and other joint service arrangements. Conditions of carriage governing liability are based on Recommended Practice 1724 of the International Air Transport Association

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[33] These new agreements are known as the Intercarrier Agreement on Passenger Liability (IIA), Agreement on Measures to Implement the IATA Intercarrier (MIA), and the U.S.-carrier adopted "Provisions Implementing the IATA Intercarrier Agreement to be Included in Conditions of Carriage and Tariffs" (IPA). *See* Department of Transportation Order 97-1-2, 1997 DOT Av. LEXIS 2 (D.O.T. Jan. 8, 1997). *See infra* pp. 16-17.

[34] Special Drawing Rights of the International Monetary Fund are based on exchange rates for U.S., German, British, French, and Japanese currencies. On July 6, one SDR equaled about U.S. $1.33. WALL ST. J., July 7, 1998, at C25.

[35] *See* n.32.

[36] *See, e.g., Deutsche Lufthansa Aktiengesellschaft v. C.A.B.*, 479 F.2d 912 (D.C. Cir. 1973).

[37] 14 C.F.R. § 203.4.

(IATA). Section 16.1 of that resolution governs international carriage, and assumes the exclusivity of the Convention's liability regime by providing that such carriage "is subject to the rules and limitations relating to liability established by the Convention unless such carriage is not international carriage to which the Convention applies." In contrast, with respect to such extra-Convention carriage, section 16.2 of IATA's Recommended Practice 1724 provides that the carrier shall be liable for damage to a passenger "only if such damage has been caused by the negligence of Carrier." Under this provision, state negligence law would apply.

ATA member airline tariffs generally incorporate the IATA language. For example, Rule 55 of Delta Air Lines' DOT-approved tariff provides:

> (B) *LAWS AND PROVISIONS APPLICABLE*
>
> (1) Warsaw Convention. The Carrier agrees in accordance with Article 22(1) of [the Warsaw Convention] that, *as to all international carriage or transportation hereunder as defined in the Convention:*
>
> (a) The Carrier shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.
>
> (b) The Carrier shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 [SDRs].
>
> (c) Except as otherwise provided under paragraph (a) and (b) hereof, the Carrier reserves all defenses available under the Convention to such claims. With respect to third parties, the Carrier reserves all rights

of recourse against any other person, including without limitation, rights of contribution and indemnity.

(d) The Carrier agrees that subject to applicable law recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.

. . . .

(C) *LIMITATION OF LIABILITY*

Except as the Convention or other applicable law may otherwise require:

(1) Carrier is not liable for any death, injury, delay, loss, or other damage of whatsoever nature . . . to passengers or unchecked baggage arising out of or in connection with carriage or other services performed by carrier incidental thereto, *unless such damage is caused by the negligence of carrier.*[38]

To the ATA's knowledge, no tariff on file at DOT contemplates that international air transportation as defined by the Convention would be subject to any liability rules other than those prescribed or permitted by the Convention. This is significant because once DOT has accepted a carrier's tariff and permitted it to go into effect, it has the force of law.[39] This Court recently reaffirmed this doctrine, known as the "filed rate doctrine" in *Maislin Industries v. Primary Steel.*[40] A carrier may not deviate

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[38] International Passenger Rules and Fares Tariff No. DL-1, NTA(A) No. 304, ¶ C.A.B. No. 459, Rules 55 B(1) and (C), effective Feb. 6, 1997 (footnotes omitted, emphasis added). Filed with DOT permission granted in Order 97-1-2. The language of paragraphs B(1)(a)-(d) is taken from the IPA (*see supra* n.33).

[39] *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939); *St. Paul Ins. Co. v. Venezuelan Int'l Airways, Inc.*, 807 F.2d 1543, 1548 (11th Cir. 1987).

[40] 497 U.S. 116, 126 (1990); *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922).

from a filed and effective tariff for foreign air transportation under any pretext.[41] The filed rate doctrine applies to air transportation.[42]

B. Recent Waivers of the Convention's Passenger Liability Limits Were Achieved on the Basis of the Industry's Expectations That the Convention's Rules Are Exclusive.

In 1995 the world's major international airlines, acting under the auspices of the ATA and IATA, achieved a consensus to waive the Convention's passenger liability limit and certain defenses.[43] This major milestone was achieved by the aviation industry, U.S. and foreign governments, and groups representing the survivors of those who have perished in airline accidents, working together to develop intercarrier agreements. Many airlines have implemented the intercarrier agreements by revising their tariffs and conditions of carriage and terminating their participation in the 1966 Montreal Agreements. Other airlines are taking comparable action. Under the new regime, U.S. and foreign airlines agree to:

1) waive the Convention's liability limit for death of, or bodily injury to, passengers;

2) waive the defense of non-negligence for claims up to 100,000 [SDRs]; and

3) preserve all other defenses and rights available under the Convention, including any rights of indemnity and contribution.

DOT has approved these intercarrier agreements.[44]

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[41] 49 U.S.C. § 41510 (1998); *accord, Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915).

[42] *Tishman & Lipp, Inc. v. Delta Air Lines*, 413 F.2d 1401, 1403 (2d Cir. 1969); *North Am. Phillips Corp. v. Emery Air Freight*, 579 F.2d 229, 233 (2d Cir. 1978).

[43] Article 22(1) of the Warsaw Convention authorizes airlines to agree to additional liabilities by "special contract."

[44] *See* Order 97-1-2.

The consensus among the airlines, both foreign- and U.S.-flag, was achieved with the common understanding that the Warsaw Convention provided the exclusive remedy for all injury and death incurred during international air transportation. Indeed, the new regime's principal purpose is to secure for U.S. citizens, including the victims of terrorists' attacks, the benefit of a uniform and efficient system providing prompt and adequate compensation for injury or death in international air transportation regardless of the country in which the lawsuit is brought. In general, the new regime's benefits are substantially more favorable than the remedies available under the law of many nations.

C. The Court of Appeals' Decision, If Not Reversed, Will Have Deleterious Effects on Passengers.

As shown, nothing in the Convention, the intercarrier agreements, the tariffs filed with DOT that rely on the Convention, or any other source suggests that the Convention contemplates application of any liability rules other than those it prescribes. The decision below threatens to take away the benefits conferred by the Convention, the intercarrier agreements based thereon, and the tariffs filed with DOT, for many passengers by undermining the principle that the Warsaw Convention provides the exclusive remedy.

First, airlines will likely see exposure to unlimited liability in the United States under federal and state laws, without regard to the Convention, as a breach of the understanding upon which the consensus to waive the liability limits was based. If allowed to stand, the decision below could disrupt that consensus and derail the ongoing implementation process.

Second, and equally disturbing, is the prospect that, if the Convention is not exclusive, foreign courts will be encouraged to declare particular claims to be outside the Convention's scope, subjecting passengers (including U.S.

citizens) to *less* favorable foreign law and depriving them of these new protections. In this regard, the term "accident" has been interpreted broadly in identifying those events for which compensation should be provided by airlines.[45] The Second Circuit, however, narrowly—and incorrectly—interpreted the term "accident" as referring only to those "catastrophic" events that were "within the contemplation of the drafters of the Convention." Pet. App. 20a. This precedent could lead to narrow definitions of the term "accident" in cases brought in foreign courts where national law is significantly less favorable to passengers than the Convention's rules.

IV. PRESERVING THE CONVENTION'S EXCLUSIVITY WILL PROMOTE THE SECURITY OF AIRLINES AND PASSENGERS.

Security programs required of airlines by countries that have signed the Warsaw Convention, including the United States, involve a complex web of international agreements that are grounded on the view that the Warsaw Convention provides the exclusive recourse for injured passengers. Changing this exclusivity premise threatens to undermine these security measures.

Security with respect to international air transportation is pervasively governed by treaty. The overwhelming majority of the parties to the Warsaw Convention are also party to the 1944 Chicago Convention, the main purpose of which is to promote safety and order in international civil aviation.[46] Under Annex 17 to that Convention, signatory countries must establish and maintain effective measures to protect the security of international civil avia-

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[45] *Air France v. Saks*, 470 U.S. at 405 (an accident "arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger").

[46] Chicago Convention, *supra* n.27, Preamble, Art. 44. *See also* NICOLAS M. MATTE, TREATISE ON AIR-AERONAUTICAL LAW 187 (1981).

tion.[47] To further develop a uniform security system, other international agreements to which the United States is party impose on signatory countries requirements designed to counter terrorist acts.[48]

Although the Chicago Convention and Annex 17 thereto recognize airline security as a sovereign police function, the United States has entrusted airlines with the bulk of that responsibility. Under U.S. law, the Federal Aviation Administrator sets screening standards and requires U.S. and foreign airlines to establish and implement security programs.[49]

The FAA has extensive regulations regarding the security measures that must be taken by airports,[50] airlines,[51] indirect air carriers (such as freight forwarders) that engage indirectly in air transportation of property,[52] and foreign airlines operating to and from the United States.[53] Airline security programs must be filed with, and approved by, the FAA.[54]

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[47] *See* ICAO, *International Standards and Recommended Practices, Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference*, Annex 17 to the Chicago Convention (6th ed. 1997).

[48] *See, e.g.*, Convention on Offenses and Certain Other Acts Committed on Board Aircraft, September 24, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23, 1971, 24 U.S.T. 564, 10 I.L.M. 1151; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, February 24, 1988, T.I.A.S. 7570, 27 I.L.M. 627.

[49] 49 U.S.C. §§ 44901-44915.

[50] 14 C.F.R. Part 107.

[51] 14 C.F.R. Part 108.

[52] 14 C.F.R. Part 109.

[53] 14 C.F.R. Part 129.

[54] 14 C.F.R. §§ 108.5, 108.7(a)(4).

Congress has also enacted legislation to assure that foreign airports provide safety and security to the flying public. Under Section 551 of the International Security Development and Cooperation Act,[55] DOT periodically assesses the effectiveness of security measures maintained at foreign airports through which U.S. travelers pass, applying ICAO standards.[56]

The elaborate system of international rules governing airline security upon which U.S. law is based was developed with a common understanding among nations that the Convention would exclusively govern airline liability. There has been no recognition that local tribunals can regulate, or otherwise impose liability upon, airlines for the normal implementation of these solemn obligations. "The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." [57]

The Second Circuit decision ignores this reliance and thus fails to appreciate the effects of its decision on international airline security. It is now well established that the Warsaw Convention governs an airline's liability to passengers for terrorist attacks, including hijacking.[58]

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[55] Pub. L. No. 99-83, § 551(a), 99 Stat. 190, 222-25 (1985).

[56] 49 U.S.C. § 44907(a)(2)(C).

[57] *United States v. Stuart*, 489 U.S. 353, 369 (1989); *see also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984); *Factor v. Laubenheimer*, 290 U.S. 276, 294-295 (1933).

[58] *See Air France v. Saks*, 470 U.S. at 405; *see, e.g., Pflug v. Egyptair Corp.*, 961 F.2d 26 (2d Cir. 1992); *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1269 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Margrave v. British Airways*, 643 F. Supp. 510 (S.D.N.Y. 1986); *Salerno v. Pan American World Airways, Inc.*, 606 F. Supp. 656 (S.D.N.Y. 1985).

Accordingly, U.S. courts have made clear that the Convention imposes "close to absolute liability" (Pet. App. 13a) for passenger injury and death arising from an airline's negligence in failing to conduct security searches.[59]

The Second Circuit's holding places airlines in an untenable situation. On the one hand, it subjects them to strict liability under the Convention for failing to conduct a search. On the other hand, it subjects them to potentially unlimited liability under state law for conducting such a search—even where, as here, the search conforms to procedures mandated by U.S. and international law. This result is not only unfair, but plainly inconsistent with the maintenance of an effective security program.

Moreover, the airline employees conducting these searches will no longer be able to rely on the Convention as circumscribing their liability.[60] The Second Circuit's decision adds an additional consideration into the mix of complex factors employees weigh in determining whether to search any particular passenger: whether the passenger is likely to sue for unlimited damages if the search does not disclose a weapon or explosive device. The decision thus not only defeats the Convention's purpose of unifying liability rules for airlines, but also threatens to compromise the security of airlines and passengers.

V. THE COURT BELOW BASED ITS DECISION ON A FUNDAMENTAL MISCONSTRUCTION OF THE CONVENTION.

The lower court's reasoning misconstrues the scope of the Warsaw Convention, as applied by the courts of this country, and effectively rewrites Article 17. The court concluded that if personal injuries arising from mandated

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[59] *See, e.g., In re Air Disaster at Lockerbie, Scotland*, 37 F.3d 804, 811 (2d Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

[60] *See Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977) (airline employees are indemnified by their employer for claims arising within the scope of their employment).

security measures were not actionable under state law without regard to the Convention, it would lead to "the absurd result of allowing carriers to escape liability for their negligence—or even their intentional torts—so long as the event giving rise to the injury was not an accident. . . ." [61] By incorrectly interpreting the meaning of the term "accident," [62] the court of appeals failed to recognize that if an airline conducts a security search in a negligent or intentionally tortious manner, that activity is certainly unexpected by the passenger and unusual for the airline. Such a search would thus be an "accident" covered by the Convention, and the passenger would have a remedy.[63]

The Convention's recently waived passenger liability limits had often been criticized as being wholly inadequate.[64] Nevertheless, there is nothing absurd about a treaty that precludes liability where no "accident" within its meaning can be found. This Court recognized in *TWA v. Franklin Mint* that rewriting the Convention's rules is not the province of the judiciary.[65]

The Warsaw Convention provides the exclusive basis for seeking a remedy for any personal injury incurred during international air transportation,[66] whether or not the event can be termed an "accident." [67] If an "accident" can be found from the facts (as the district court did

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[61] Pet. App. 20a.

[62] *See, supra* n.45 and accompanying text.

[63] *Air France v. Saks*, 470 U.S. at 405 (1985).

[64] *In re Korean Air Lines Disaster*, 829 F.2d 1171 (D.C. Cir. 1987); Department of Transportation Order 96-10-7, 1996 DOT Av. LEXIS 640 (D.O.T. Oct. 3, 1996). *See supra* n.22.

[65] 466 U.S. 243 (1984).

[66] Warsaw Convention, Article 1.

[67] As noted (*supra* n.3), an airline is liable under Article 17 of the Convention for injuries sustained in the course of international air transportation that result from an "accident." *See Air France v. Saks*, 470 U.S. at 396.

here) and if the "accident" results in physical injury (which Respondent does not allege), then the Convention provides a remedy.

If, however, an "accident" cannot be found (as the court of appeals held), or if an "accident" is found to have occurred but there is no physical injury (as the district court found), then the Convention does not provide a remedy.[68] In all cases, however, the Convention's uniformity and exclusivity dictate that parties turn to the Convention—and the Convention alone—in seeking redress for personal injuries incurred in international air transportation.

VI. THE U.K. HOUSE OF LORDS HAS ALSO FOUND THE CONVENTION TO BE EXCLUSIVE.

To further the Convention's purposes of uniformity and harmonization, treaty partners properly consider one another's views.[69] The decision below conflicts directly with the decision of the U.K. House of Lords in *Abnett v. British Airways*.[70] Affirmation of the decision below will make U.S. law inconsistent with the law applied by some of our largest aviation trading partners.

Abnett involved an international flight that arrived for refueling in Kuwait early on the morning of August 2, 1990, about five hours after Iraqi forces had begun to invade Kuwait. The passengers disembarked into the transit lounge to await departure. But while they were in the terminal, the Iraqis took them prisoner and they became "human shields." [71]

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[68] *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530; *Air France v. Saks*, 470 U.S. 392.

[69] *See Air France v. Saks*, 470 U.S. at 404.

[70] Pet. App. 34a-65a; *accord, Emery Air Freight Corp. v. Nerine Nurseries Ltd.* [1997] 3 NZLR 723.

[71] Pet. App. 38a.

Judith Abnett and the Sidhu family were among the passengers. Abnett sought relief in British courts for damage occasioned by delay under Article 19 of the Convention and at common law for breach of contract. The Sidhu family did not plead under the Convention at all since they filed their claim outside the two-year time limit allowed under Article 29 of the Convention. Instead, they based their claim on common-law negligence.

The House of Lords, in reviewing their appeals, carefully analyzed the Convention's text and *travaux preparatoires*, as well as this Court's decisions in *Air France v. Saks* and *Eastern Air Lines v. Floyd* and a French decision arising out of the same events.[72] Finding no assistance in U.S. authorities, Lord Hope writing for the panel found that Article 24's phrase "the cases covered by Article 17" extends "to all claims made by the passenger against the carrier arising out of international carriage by air" (other than delay and certain baggage claims).[73] The House of Lords dismissed the common-law claims and found the Sidhu's baggage claim time-barred.

Neither party had made a claim under Article 17, because the principal basis for each of their claims was psychological damage for which Article 17 gives no remedy.[74] The parties also apparently believed that there was no "accident" within the meaning of Article 17. They apparently did not argue that being taken hostage at the begin-

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[72] The Court distinguished a French decision arising out of the same events. Pet. App. 63a. In that case, the court of first instance found that the events did not occur in the course of disembarking (and hence in international air transportation) within the meaning of Article 17. The French court applied French law to allow plaintiffs damages unrestricted by Article 22. An intermediate French appellate court upheld the lower court's decision on November 12, 1996. *British Airways v. Mohamed*, No. 95-26736, Judgment at 11 (CA Paris, 1996).

[73] Pet. App. 55a.

[74] *See, e.g., Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530.

ning of a war during an international journey was "an unexpected or unusual event external to the passenger," thereby meeting the *Air France v. Saks* test. Nonetheless, the House of Lords was somewhat concerned by the lack of a remedy:

> An answer to the question which leaves claimants without a remedy is not at first sight attractive. It is tempting to give way to the argument that where there is a wrong there must be a remedy. . . . Alongside these principles, however, there lies another great principle, which is that of freedom of contract. . . . [The Convention] was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available. . . . *A balance was struck, in the interests of certainty and uniformity.*[75]

CONCLUSION

For the foregoing reasons, the Court should uphold the exclusivity of the Convention and reverse the holding of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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[75] Pet. App. 64a-65a.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

EL AL ISRAEL AIRLINES, LTD., PETITIONER

v.

TSUI YUAN TSENG

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

The Solicitor General respectfully moves for leave to file the attached supplemental brief on behalf of the United States as amicus curiae.

This case involves the interpretation of Article 24 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air (1929), 49 Stat. 3000 (49 U.S.C. 40105 note), also known as the Warsaw Convention. In response to this Court's invitation, we filed a brief at the petition stage on behalf of the United States as amicus curiae, in which we argued that the Court should grant certiorari. After certiorari was granted, we filed a brief on the merits, and the Court has granted our motion to participate in the oral argument. We noted in our brief at the merits stage

(and in our earlier letter to the Clerk of July 1, 1998) that the Senate Foreign Relations Committee had recently reported Montreal Protocol No. 4—which, among other things, amends the text of Article 24 of the Warsaw Convention—to the full Senate for its consideration. We explained (U.S. Br. 26-29) that ratification of Montreal Protocol No. 4 by the United States could affect the Court's consideration of this case, and we promised to keep the Court informed of further developments (*id.* at 29).

On September 28, 1998, the full Senate gave its advice and consent to ratification of Montreal Protocol No. 4. Because the Court invited the Solicitor General to file a brief before it decided whether to grant review in this case, we respectfully move for leave to file the attached supplemental brief, which explains the significance of the Protocol for this Court's continued consideration of the case.

SETH P. WAXMAN
Solicitor General

OCTOBER 1998

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SUPPLEMENTAL BRIEF FOR
THE UNITED STATES AS AMICUS CURIAE

In our letter of July 1, 1998, we informed the Court that the Senate Foreign Relations Committee had favorably reported Montreal Protocol No. 4 to the full Senate and that, if ratified by the United States, the Protocol could affect how this Court might choose to dispose of this case. Subsequently, in our amicus brief on the merits (at 29), we promised to keep the Court informed of further developments.

On September 28, 1998, the full Senate voted to give its advice and consent to ratification of the Protocol. See 144 Cong. Rec. S11,059-02 (daily ed.). Upon the signing of the instrument of ratification by the President and the deposit of that instrument with the Government of Poland, the United States will have ratified the Protocol, and the Protocol will "come into

force" in the United States 90 days later. Montreal Protocol No. 4, Art. XVIII. The Department of State informs us that the instrument of ratification has been sent to the White House for the President's signature. Because oral argument is scheduled for November 10, 1998, we are filing this supplemental brief now to apprise the Court of the significance that ratification of the Protocol by the United States would have for this case. We will inform the Court immediately upon completion of the ratification process.

1. As we explain in our amicus brief on the merits (at 10-12, 26-28), Montreal Protocol No. 4 makes a highly relevant amendment to the exclusivity provision of the Warsaw Convention. In its original form, Article 24 of the Convention provides that, "[i]n the cases covered by article 17," "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention[.]" This case turns on the meaning of that provision and, in particular, on the disputed meaning of the phrase "[i]n the cases covered by article 17." See U.S. Br. 20-28. Montreal Protocol No. 4 removes that language and amends Article 24 to read: "*In the carriage of passengers and baggage*, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention[.]" Art. VIII (emphasis added). As the Senate Foreign Relations Committee explained in its report recommending that the Senate give its advice and consent to the Protocol, the amended language "declares that *all* damage actions arising out of international air carriage governed by the Convention are subject to the conditions and limits of liability set out in the Convention." S. Exec. Rep. No. 20, 105th Cong., 2d Sess. 14 (1998) (Senate Report) (emphasis added). Put another way, a

passenger seeking damages for *any* form of personal injury arising from "international air carriage governed by the Convention," as amended by the Protocol, must meet the conditions for liability set forth in Article 17, which itself remains unchanged.

If this case had arisen under the Convention as amended by Montreal Protocol No. 4, the amended language would leave no doubt that the Convention bars respondent's state-law claim for damages, which (in two different respects) does not satisfy Article 17's conditions for liability. See U.S. Br. 18-19, 26-28. Indeed, respondent addresses the significance of the Protocol principally by arguing that it lacks retroactive application to her case and that "[t]here would * * * have been no reason to adopt the changes effected by the Protocol if all personal injury causes * * * had been covered originally in the eyes of the international signatories." Resp. Br. 38 (italics omitted); see also Resp. Br. 37 ("Some five years had passed from the time [of the incident at issue here] before a sufficient number of Convention signatories agreed to make it—and Article 17—the exclusive basis upon which a passenger could recover for personal injuries, without making exclusiveness retroactive to willful tort cases which had already accrued."). Ratification of Montreal Protocol No. 4 by the United States would thus raise the question whether this case, which arises under the original language of the Convention, still presents an issue of recurring prospective significance.

2. On balance, we agree with petitioner that it would be appropriate for this Court to decide this case on the merits notwithstanding ratification of the Protocol. But we disagree with petitioner, at least in part, about why that is so. Petitioner urges the Court to "resolve the issue of exclusivity" presented here because of concern

that, even under the Protocol's amendment of the exclusivity provision in Article 24, future passengers who are injured in the course of international air travel, but who cannot satisfy the liability conditions of Article 17, may still try to bring personal injury claims under local law. Reply Br. 18-19. The Protocol, however, squarely forecloses such claims. Under Article 24, as amended, the Convention's liability conditions would apply to "any action for damages, however founded," arising from "the carriage of passengers and baggage" in international air transportation governed by the Convention. Montreal Protocol No. 4, Art. VIII. Just as important, even if there were some room for dispute about the meaning of that language, this Court does not ordinarily decide issues arising under an obsolescent provision in order to cast light on distinct issues arising under a new and differently worded provision. The "issue of exclusivity" that petitioner urges the Court to resolve under the original language of the Convention is not necessarily identical to the "issue of exclusivity" that would be presented in cases arising under the Convention as amended by the Protocol, even though in our view the *result* should be the same under both. See Senate Report 14 (confirming that, in relevant respects, the Protocol "continues the existing rules of the Warsaw Convention for the carriage of baggage and passengers").

We nonetheless suggest that the Court decide this case on the merits for a separate reason, to which petitioner also adverts in its opening brief (at 39 n.40): Even after ratification of the Protocol by the United States, the courts of this country could still be presented with new cases in which the original exclusivity provision of the Warsaw Convention is applicable.

In suits for damages, the Protocol's amendments to the Convention apply "provided that the places of departure and destination * * * are situated either in the territories of two Parties to th[e] Protocol or within the territory of a single Party to th[e] Protocol with an agreed stopping place in the territory of another State." Montreal Protocol No. 4, Art. XIV. If either the place of departure or the place of destination lies within a State that has ratified only the original Convention and not the Protocol, the original terms of the Convention would continue to govern. See generally *In re Korean Air Lines Disaster of Sept. 1, 1983*, 664 F. Supp. 1463, 1469 (D.D.C. 1985), aff'd on other grounds, 829 F.2d 1171 (D.C. Cir. 1987), aff'd *sub nom. Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989); see also Montreal Protocol No. 4, Art. XX(3).

The Department of State informs us that at least 30 countries have already ratified the Protocol, and the Department anticipates that other countries are likely to do so within the next few years. Over time, therefore, the number of cases presenting the precise exclusivity question at issue here will probably diminish. Moreover, even if no additional countries were to ratify the Protocol, ratification by the United States would itself ensure that the terms of the Protocol will govern many if not most disputes in this country arising within the scope of the Convention. That is so because "the places of departure and destination" for round trips—a very common form of international air travel for passengers—are generally considered the same place for purposes of this treaty regime. Thus, if a passenger buys a round-trip ticket from country X to country Y and back, Montreal Protocol No. 4 will likely govern personal-injury suits arising from that trip so long as country X has ratified the Protocol, whether or not

country Y has done so. See, *e.g.*, *Alexander* v. *Pan American World Airways, Inc.*, 757 F.2d 362, 363 (D.C. Cir. 1985); *Petrire* v. *Spantax, S.A.*, 756 F.2d 263, 265 (2d Cir.), cert. denied, 474 U.S. 846 (1985); see also *Swaminathan* v. *Swiss Air Transport Co.*, 962 F.2d 387, 389 (5th Cir. 1992).

There may nonetheless be a range of circumstances, especially in the near term, in which United States courts would need to resolve claims under the original terms of the Warsaw Convention, even if those claims accrued after ratification of the Protocol by the United States.* One such circumstance would be where an injured passenger had purchased a one-way ticket and either the place of departure or the place of destination was within a country that had ratified the Convention but not Montreal Protocol No. 4. Another circumstance would be where the injured passenger had purchased a round-trip ticket *from* such a country *to* the United States and back. Cf. Warsaw Convention, Art. 28(1) (jurisdictional provision). Such a passenger would generally be subject to the original terms of the Warsaw Convention, even though another passenger in the same airplane would be subject to the terms of the Protocol if he or she purchased tickets for a round trip that began and ended in the United States. Resolution of this case in petitioner's favor would eliminate an anomaly posed by the Second Circuit's decision, under which the Convention would set forth exclusive conditions for liability as to the latter passenger but not as to the former.

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* As noted in our amicus brief on the merits (at 10 n.5), the Hague Protocol of 1955, which was ratified by a number of foreign states several decades ago (and is now incorporated by Montreal Protocol No. 4), does not itself amend Article 24.

In sum, a decision by the Court on the merits would have some precedential significance, even after ratification of Montreal Protocol No. 4 by the United States. Because the case has now been fully briefed, we believe that it would be appropriate for the Court to give the case plenary consideration despite ratification of the Protocol. In the alternative, the Court may wish to vacate the judgment of the court of appeals and remand the case to that court for further consideration in light of such ratification if it occurs while this case is still pending.

Respectfully submitted.

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OCTOBER 1998

FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

—v.—

TSUI YUAN TSENG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Montreal, Sept. 25, 1975 ..... *passim*

IN THE

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner EL AL respectfully files this supplemental brief to address the issues raised by the supplemental briefs of the United States as *amicus curiae* and respondent. The Solicitor General has apprised the Court of the prospective ratification of Montreal Protocol No. 4,[1] which most likely will enter into effect in early 1999, and also of the Solicitor General's views on the significance of the amendment of Article 24 in Montreal Protocol No. 4. Respondent seeks to limit the scope of the question granted review by the Court and urges *sua sponte* dismissal of the writ.

[1] Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Montreal, Sept. 25, 1975.

For the reasons set forth in the supplemental brief for *amicus curiae* United States and the reasons set forth herein, prospective ratification of Montreal Protocol No. 4 does not render unnecessary for review by the Court the question of the exclusive application of Article 17 of the Warsaw Convention[2] treaty to passenger injuries sustained in the course of "international transportation." Accordingly, petitioner respectfully urges the Court to give plenary consideration to the question presented.

The proper interpretation of the unamended Warsaw Convention is a matter of continuing importance to the lower courts, to EL AL and all other carriers providing security for international air transportation, and to the travelling public. The exclusivity issue should be reviewed and settled by the Court to ensure the uniform and proper application of the treaty to all pending Warsaw Convention personal injury actions and all future personal injury actions governed by the unamended Warsaw Convention, and to preempt all future claims that an action can be "found to be outside the Convention" (*Tseng v. EL AL Israel Airlines, Ltd.*, 122 F.3d 99, 104 (2d Cir. 1997), *cert. granted in part*, 118 S. Ct. 1793 (1998) (JA 40-62)), whether unamended or amended by Montreal Protocol No. 4.

1. Montreal Protocol No. 4 does not substantially change Article 24 of the Warsaw Convention as it relates to passenger cases

The Solicitor General asserts that amended Article 24(1) "squarely forecloses" any argument that personal injury claims arising subsequent to ratification of Montreal Protocol No. 4 could be brought outside the terms of Article 17 of the Convention. (US Supp. Br. 4). Set forth below are Article 24

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C.A. § 40105 (1997) (note).

in its unamended form and as amended by Montreal Protocol No. 4.

Article 24 (Warsaw Convention)	Article 24 (Montreal Protocol No. 4)
1. In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.	1. *In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention*, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.
2. *In the cases covered by article 17 the provisions of the preceding paragraph shall also apply*, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights. 49 Stat. 3020 (1934).	2. In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.

The revision in the introductory phrase from "cases covered by Article 17" to "carriage of passengers and baggage" and incorporation of the language referencing the preceding paragraph (noted in italics) are not substantive changes.[3] Article 17 is the only provision of this treaty which, it has been held, creates a cause of action for personal injury. Passengers must satisfy the Article 17 conditions to a right of recovery under the unamended Convention and Montreal Protocol No. 4 irrespective of whether the Protocol makes express reference to Article 17. In other words, both introductory clauses are referring a passenger to the same underlying provision---Article 17. Thus, EL AL agrees with the view of the Solicitor General that "the *result* should be the same" under both the unamended Convention and Montreal Protocol No. 4. (US Supp. Br. 4 (emphasis in original)). The treaty is exclusive whether unamended or as soon to be amended. However, the court below held to the contrary on the exclusivity issue which the Court has agreed to review.

2. The "however founded" language in Article 24 upon which the lower courts rely to avoid the exclusive application of the Convention remains unchanged

The lower courts have found that the Warsaw Convention is not exclusive based on the parsing of the "however founded" phrase of Article 24. The "however founded" phrase remained unaltered in the passenger[4] provision of amended Article 24.

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[3] *Accord Northeastern Florida Chapter of Associated General Contractors of Am. v. Jacksonville, Fla.*, 508 U.S. 656, 662 n.3 (1993).

[4] Montreal Protocol No. 4, to which the Senate gave its advice and consent, amends and updates the cargo provisions of the Convention. Montreal Protocol No. 3, which was intended to address passenger liability issues but to which the U.S. has no intention of adhering, contains the same clarification of the Article 24 "however founded" phrase—"whether under this Convention or in contract or in tort or otherwise"—found in the amended cargo provision of Montreal Protocol No. 4. Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Montreal, Sept. 25, 1975.

(footnote continued)

Accordingly, unless the exclusivity issue is addressed, the argument will continue to be raised that "any action for damages, however founded" gives recognition to causes of action outside the Convention. Numerous courts have viewed the "however founded" phrase as an express indication that a passenger's action may be "founded" on state law, albeit subject to the conditions and limits of the Convention. *See, e.g., In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1492 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) (Mikva, J., dissenting) ("Article 24's reference to 'any actions for damages, however founded' clearly contemplates actions arising under separate sources of law but places some limits on recovery."); *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 414 n.25 (9th Cir. 1983) ("the language of Article 24(1) that any action, 'however founded,' must be brought subject to the conditions and limits of the Convention, might be taken to mean that an action must be 'founded' on some law other than the Convention."); *Estenssoro v. American Jet, S.A.*, 944 F. Supp. 813, 817 (C.D. Cal. 1996) ("The Court therefore finds the inclusion of the words 'however founded' in Article 24 of the Convention indicates their intent that the Convention not preempt causes of action based on state law."); *see also Jack v. Trans World Airlines, Inc.*, 820 F. Supp. 1218, 1220-21 (N.D. Cal. 1993) (providing comprehensive list of "however founded" decisions).

In addition, where plaintiffs artfully plead state law claims, this faulty analysis has enabled district courts to improperly issue remand orders declining to exercise federal question jurisdiction over Warsaw Convention cases removed to

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The Protocols were intended for contemporaneous ratification over 20 years ago, prior to the Second Circuit decision in *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), which found that the Warsaw Convention "creates the universal source of a right of action." Interestingly, respondent, in her attempt to avoid the conditions in Article 17, appears to question whether a cause of action is created by the Convention on the basis she is alleging wilful misconduct. (R. Br. 27-30, 33-36).

federal court. *See Alvarez v. Aerovias Nacionales de Colombia, S.A.*, 756 F. Supp. 550 (S.D. Fla. 1991); *see also Campos v. Sociedad Aeronautica de Medellin Consolidada, S.A.*, 882 F. Supp. 1056 (S.D. Fla. 1994), *appeal dismissed*, No. 94-4153 (11th Cir. Oct. 31, 1995) (remand orders are not subject to a right of appeal); *Calderon v. Aerovias Nacionales De Colombia, Avianca, Inc.*, 738 F. Supp. 485 (S.D. Fla. 1990), *appeal dismissed*, 929 F.2d 599 (11th Cir.) (same), *cert. denied*, 502 U.S. 940 (1991).

3. The lower courts will still be free to follow the erroneous decisions that the scope of the Warsaw Convention is subject to the finding of an accident under unamended Article 17

There is an increasing line of decisions upholding the premise that, for an injury to be within the scope of the Convention, the claim must have been the result of an "accident" under Article 17. *See, e.g., Tandon v. United Air Lines*, 926 F. Supp. 366 (S.D.N.Y. 1996); *Curley v. American Airlines, Inc.*, 846 F. Supp. 280 (S.D.N.Y. 1994); *Levy v. American Airlines, et al.*, 24 Av. Cas. (CCH) 17,581 (S.D.N.Y. June 9, 1993); *Adler v. Malev Hungarian Airlines*, No. 89 Civ. 8252, 1992 WL 15144 (S.D.N.Y. Jan. 23, 1992). Petitioner sought review in this case to correct the lower court's misapplication of (unamended) Article 17 (Pet. Br. 15-21).

The Court should resolve the exclusivity issue and hold that the treaty exclusively governs injuries sustained in the course of international air transportation irrespective of whether the passenger can establish a right of recovery under Article 17. *Compare In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991); *Abramson v. Japan Airlines Co.*, 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985); *Walker v. Eastern Air Lines, Inc.*, 775 F. Supp. 111 (S.D.N.Y. 1991), *reargument denied*, 785 F. Supp. 1168 (S.D.N.Y. 1992).

4. The case presents a compelling question of treaty interpretation on which the lower courts await the decision of the Court

Montreal Protocol No. 4, insofar as passenger claims are concerned, did not repeal the treaty in whole or in part. As the plethora of decisions evading exclusivity demonstrate (*see* decisions cited in points 2 and 3, *supra*), the prospective ratification of Montreal Protocol No. 4 will not end the exclusivity debate. As petitioner has noted (Pet. Reply Br. 18-19; Pet. Br. 38-40), the question of exclusivity transcends the facts of this case. The Court should determine the proper interpretation of this unamended treaty (as applicable to all pending Warsaw Convention cases and to future cases where the cause of action arises without Montreal Protocol No. 4 being effective, either because of the time of the injury or the contracting states involved). This interpretation should not differ under Montreal Protocol No. 4 (which does not amend Article 17 and leaves in place the "however founded" language).

The lower courts are awaiting the decision of the Court to resolve the question whether the Warsaw Convention is exclusive. *See, e.g., Tseng* 122 F.3d at 104 (JA 53); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d at 1492 (dissent); *Campos*, 882 F. Supp. at 1058; *Jack*, 820 F. Supp. at 1226; *Walker v. Eastern Air Lines*, 785 F. Supp. 1168, 1172 (S.D.N.Y. 1992); *Abnett v. British Airways plc*, [1997] 1 All E.R. 193 (H.L. 1996) (U.K.) (Pet. App. 61a). Absent resolution in this case, the issue will remain unresolved and the district courts of the First, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits will still be free to follow case law finding that an injury which was not the result of an Article 17 "accident" enables a passenger to seek recovery under common law. Further, the district courts of the Second and Third Circuits are compelled to follow *Tseng* and *Abramson* and uphold a right to state law causes of action when there is no "accident".

The Court has twice declined to address the issue of the exclusivity of the Convention. *See Air France v. Saks*, 470 U.S. 392 (1985); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991). The importance of the treaty question presented, its recurring prospective significance, the unchanged "however founded" language of Article 24 and unamended Article 17 under Montreal Protocol No. 4, and the "significant expenditure of resources by the litigants [and] *amici*" in thoroughly briefing the issues (*Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 125 (1994) (O'Connor, dissenting)) all favor plenary consideration of this fundamental issue of treaty interpretation. The Court should resolve the exclusivity issue to ensure the clear and consistent application of the terms of this treaty by the lower courts.

Respectfully submitted,

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EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

vs.

TSUI YUAN TSENG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN PARTIAL OPPOSITION TO THE SUPPLEMENTAL BRIEF OF THE UNITED STATES AS AMICUS CURIAE

Amicus Curiae United States' proposed Supplemental Brief appears to agree with respondent, and petitioner does not deny, that Montreal Protocol No. 4 would lack retroactive effect here when it goes into force 90 days after the President signs the instrument of ratification and it is deposited with the Government of Poland.

Agreeing this case had *not* arisen under the Convention as amended by Montreal Protocol but earlier, *Amicus* US posits that *if* it had,

> the amended language would leave no doubt that the Convention bars [would bar!] respondent's state-law claim for damages which . . . does not satisfy Article 17's conditions for liability.

(p.3 US Supp. Brf.) But this was not the case. The parties' rights and obligations accrued long before the amendment.

Seeking to keep the petition alive in this Court though it has lost its significance on the docket because the law governing it is about to become obsolete, *Amicus* US argues that the Court should still decide the case on the merits because there may be some other cases in which the exclusivity provision of the original Warsaw Convention is applicable. It does not quantify how many or identify such cases. It nonetheless suggests that

> a decision by the Court on the merits would have some precedential significance [and b]ecause the case has now been fully briefed, we believe it would be appropriate for the Court to give the case plenary

> consideration despite ratification of the Protocol. In the alternative, the Court may wish to vacate the judgment of the court of appeals and remand the case to that court for further consideration in light of such ratification if it occurs while this case is still pending.

(p.7 US Supp. Brf.)

A better alternative would be dismissal of the writ because of the recent events. *Amicus* US has already agreed that ratification now would not affect rights accrued at a time when the unamended Convention's Article 24 limited exclusivity to those cases "covered by Article 17" (Article 24(2)). Vacatur of the judgment below and "further consideration" by the court of appeals of this case "in the light of such ratification" of the inapplicable Montreal Protocol No. 4 would be a waste of judicial resources. So too would be argument and deliberation on this case in this Court. The issues raised here are about to become academic.

This case should not be decided upon any basis other than the law as it was when the cause accrued but which will soon expire. Imaginative hypothetical events which theoretically might or might not come to pass in the future are posed by *Amicus* US to justify burdening the Court with a case likely to be the last of its kind. The Court is asked by *Amicus* US to employ its resources, not for the sake of the parties here but to set precedent for cases arising under the law of foreign states which have not ratified Montreal Protocol No. 4, an illusory task, the Court lacking sway over foreign law, and a hypothetical trickle of domestic cases which may never be brought and in any event will soon dry up. This is asked because of a recent change in the law which does not govern the controversy at hand.

Respectfully submitted,

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— v.—

TSUI YUAN TSENG,

Respondent.

On Writ Of Certiorari to the United States Court Of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION IN SUPPORT OF PETITIONER

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IN THE

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OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

—v.—

TSUI YUAN TSENG,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The International Air Transport Association (IATA) respectfully moves for leave to file the attached Brief as *amicus curiae* in this case. The consent of counsel for the petitioner was obtained. The consent of counsel for respondent was requested and refused. This Court previously granted IATA's motion for leave to file a Brief as

amicus curiae in Support of the Petition for Writ of Certiorari. 1998 U.S. LEXIS 3398 (May 18, 1998).

IATA's interest in this case derives from its efforts on behalf of its 256 member air carriers to preserve the Warsaw Convention[1] as the uniform determinant of international air carrier liability to passengers while voluntarily modernizing and liberalizing its application. Voluntary initiatives led by IATA are ongoing and strongly supported by the United States Department of Transportation and other governmental authorities.

The Court's decision on the issue presented will have a significant impact on these efforts. As set forth more fully in the Brief attached to this motion, it is of national and international importance that this Court's decision take cognizance of these developments.

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Dated: July 16, 1998

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C. § 40105 (1997) (note).

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No. 97-475

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

— v.—

TSUI YUAN TSENG,

Respondent.

On Writ Of Certiorari to the United States Court Of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL AIR TRANSPORT ASSOCIATION IN SUPPORT OF PETITIONER

The International Air Transport Association ("IATA") respectfully submits this brief as *amicus curiae* in support of petitioner.[1]

[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation and submission of this brief.

INTEREST OF *AMICUS CURIAE*

IATA is an organization of some 256 air carriers, including virtually all of the international air carriers, the majority of which are either owned or controlled by sovereign nations.[2] Since its establishment in 1945 by Special Act of the Canadian Parliament, IATA has worked closely with governments and intergovernmental organizations to achieve and maintain uniformity in the interpretation of international agreements affecting civil aviation, including the Warsaw Convention.[3] IATA has also worked to assure that such agreements are responsive to inevitable changes in technology, economics and jurisprudence. These activities are consistent with IATA's overriding purpose of promoting safe, regular and economical air transportation for the benefit of all peoples of the world.

Many of IATA's member air carriers transport passengers, baggage and goods to and from the United States and, therefore, are subject to United States jurisdiction. IATA is currently playing a major role in promoting voluntary air carrier agreements that waive the Warsaw Convention's limitation of liability for international passenger air transportation and restrict use of certain defenses. These efforts have been approved by the U.S. Department of Transportation ("DOT") and many other government authorities around the world. The Second

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[2] A complete list of IATA's member air carriers is found in the Appendix to its October 10, 1997 Brief *Amicus Curiae* in Support of Petitioner at the *certiorari* stage.

[3] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C. § 40105 (1997) (note). The Articles cited herein are reproduced at Appendix A.

Circuit's decision in *Tseng v. EL AL Israel Airlines, Ltd.*, 122 F.3d 99 (2nd Cir. 1997), if sustained, could inhibit this global effort by denying IATA member air carriers serving the United States the benefit of the Convention's fundamental liability boundaries and uniform liability regime. It would thus make IATA's effort to encourage additional air carriers to adopt liberalized and modernized liability provisions substantially more difficult because carrier interest in voluntarily enhancing passenger rights under the Convention is tied to the corresponding benefit of preserving a properly bounded and uniform liability regime.

Accordingly, IATA has a direct and substantial interest in the case before the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case comes before the Court at an extraordinary time in the history of the Warsaw Convention liability regime. Since 1995, more than 100 air carriers, including the vast majority of the major international carriers, have agreed to waive all monetary limitations on compensatory damages permitted under the Convention and to absorb a substantial amount of strict liability in Convention cases. The voluntary agreements leading to these actions have been endorsed as a "gigantic step" forward by the DOT, used as a standard for European air carrier liability by the European Union[4] and applauded by governments throughout the world. They may indeed have broken the logjam which has heretofore precluded governments from comprehensively updating the

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[4] Council Regulation (EC) No. 2027/97 (Oct. 9, 1997), eff. Oct. 17, 1998 (extending regime of no limits and 100,000 Special Drawing Rights strict liability to both domestic and international operations of European air carriers).

Convention[5] and they have apparently persuaded the United States Senate to move forward ratification of Montreal Protocol No. 4 to the Convention, and thus reaffirm the Convention's occupation of the field of airline liability for passenger injury in international air transportation. *See* Letter from Waxman, Solicitor General, to Suter, Clerk of the Supreme Court of the United States, July 1, 1998 at 2.

The Second Circuit's decision in *Tseng* is both legally erroneous and threatening to this positive movement. If affirmed, it would create liability in the absence of both the accident -- *i.e.*, "an unexpected or unusual *event* or *happening* that is external to the passenger", *Air France v. Saks*, 470 U.S. 392, 405 (1985) (emphasis added) -- and the physical injury prerequisites to recovery under Article 17, *Eastern Airlines v. Floyd*, 499 U.S. 530, 535-36 (1991). This liability would be unbounded by Convention rules and administered under a variety of state laws. It would thus depart radically from a treaty regime which, as this Court previously has emphasized, is designed to promote certainty and uniformity in the law governing air carrier liability in international air transportation.

The consequences of such a departure would be extremely unfortunate. The preservation of insurable boundaries and

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[5] On November 26, 1997, the Council of the International Civil Aviation Organization ("ICAO") established a Special Group on the Modernization and Consolidation of the "Warsaw System," (SGMW). *See* ICAO Doc. C-WP/10688. This Special Group is considering a draft revised Convention prepared by the ICAO Legal Committee, ICAO Doc. 9693-LC/190, and is currently reviewing the comments of Member States on the draft text in contemplation of a Council decision on convening a Diplomatic Conference. *See* Report of the Meeting of the Special Group on the Modernization and Consolidation of the "Warsaw System" (SGMW), Montreal, April 14-18, 1998, (noting "a strong commitment towards the swift finalization of the new instrument" to "seize this historic opportunity").

uniform liability rules in international air transportation under the Convention has been the carrot which has induced many IATA members to voluntarily waive Article 22(1) limits in Article 17 cases. Similarly, the facilitation of settlement by uniform, predictable Convention rules has encouraged carriers to accept a substantial measure of strict liability as a further means of minimizing litigation costs. The decision below, by contrast, would leave carriers uncertain as to whether Convention rules would apply to any particular claim since plaintiffs' attorneys would certainly plead non-Convention claims as alternatives or supplements in virtually every case arising in international air transportation. Moreover, litigation costs undoubtedly would escalate as novel, non-Convention claims were adjudicated and settlement postponed.

The inevitable result would be a significant disincentive to expansion of participation in beneficial intercarrier agreements. In addition, the lure of litigating outside Convention boundaries could stir opposition to United States participation in continuing international negotiating efforts to enhance the position of passengers under the treaty regime while reaffirming its preemptive purpose and uniform liability rules.

IATA believes that the wording, purpose and negotiating history of the Warsaw Convention require reversal of the decision below. The preclusive effect of Article 17 limitations was recently affirmed by the House of Lords for exactly these reasons in *Abnett v. British Airways plc,* 1 All E.R. 193 (H.L. 1996) and IATA encourages the Court to give weight to this well-considered decision as well as the Fifth Circuit's analysis in *Potter v. Delta Airlines*, 93 F.3d 881 (5th Cir. 1996) which reached the same conclusion. Thus, both on legal and practical grounds, reversal of the decision below is essential.

ARGUMENT

I. ARTICLE 17 OF THE WARSAW CONVENTION PROVIDES THE EXCLUSIVE REMEDY FOR AIRLINE PASSENGERS INJURED IN "INTERNATIONAL TRANSPORTATION" AS DEFINED BY ARTICLE 1(2) OF THE CONVENTION.

Petitioner and the Solicitor General will address in detail the errors in the Second Circuit's reasoning and analysis which led it to deny preemptive effect to the Convention's liability regime. However, there are several points of special interest to the international airline community that IATA wishes to emphasize.

A. The Court Below Improperly Engaged In Judicial Activism In Attempting to Find a Set of "Ordinary Torts" Outside The Convention.

To reach its ultimate conclusion denying full preemptive effect to the Convention's liability regime, the Second Circuit chose to ignore this Court's admonitions on how the Convention is to be interpreted, and adopted a narrow approach based more on assertion than reason. It also cramped the preemptive effect of the treaty, which is the supreme law of the land, without engaging in any of the traditional federal preemption analysis required by this Court's precedents.

1. The Second Circuit Failed To Follow This Court's Guidance In Interpreting The Convention.

In *Saks*, *Floyd*, and *Zicherman v. Korean Air Lines*, 516 U.S. 217 (1996), this Court set out clear guidelines to be applied when interpreting the Convention.

First, the French text should be consulted to guide the analysis "because it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties . . . [and] because the Warsaw Convention was drafted in French by continental jurists." *Saks*, 470 U.S. at 399. The French version is also "the only authentic text" of the Convention. *Floyd*, 499 U.S. at 535.

Second, isolated comments of delegates reported in the minutes of the 1929 Warsaw Conference are not determinative of the meaning of Convention Articles because these "remark[s] [do] not have the authority of submissions by the drafting committee," and may be nothing more than generalizations that do not "focus[] specifically" on the interpretive issue under consideration. *Zicherman*, 516 U.S. at 227.

Third, with particular reference to the scope of air carrier liability and Article 17, interpretations that best "accord[] with the Warsaw Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation" are preferred. *Floyd*, 499 U.S. at 552. In general, "treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Saks*, 470 U.S. at 396 (internal citation omitted).

The Second Circuit ignored each of these interpretive principles. First, it looked only at the English text of Article 24(2) in concluding that the Convention was exclusive only where presumptive liability arose under Article 17. *Tseng*, 122 F.3d at 104-105. The Solicitor General's Brief in Support of Petition for Writ of Certiorari establishes that the French text's "[d]ans les cas prévus à l'article 17" encompasses all claims "in the circumstances anticipated [or 'foreseen'] in Article 17" *i.e.*, where a passenger seeks relief for injuries sustained between embarkation and disembarkation. *See* Solicitor General's Brief in Support of Petition for Writ of Certiorari at 14-15. The term "les cas prévus" "serves as a shorthand for personal injury cases in general -- which Article 17 addresses (or 'anticipates') comprehensively -- and distinguishes that class of cases from cases involving damaged or lost luggage and delay, to which Article 24(1) refers with the parallel phrase 'les cas prévus aux articles 18 et 19'." *Id.* The Second Circuit's English-only analysis, by ignoring the more expansive meaning of the Convention's French text, fails to "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Saks*, 470 U.S. 399.

Second, to bolster its English language reading of Article 24(2), the Second Circuit relies on vague, non-specific remarks by individual delegates or delegations in the English translation of the minutes of the 1929 Warsaw Conference. *Tseng*, 122 F.3d at 105. However, the statements it cites do not specifically address the question at issue. Rather, the referenced remarks merely suggest that the delegates were aware that the Convention would not deal with all issues affecting international commercial aviation and that a number of undefined subjects which are not addressed by the Convention would, *per force*, be left to domestic laws of the various signatory nations for resolution. Lord Hope of

Craighead, speaking for the House of Lords in *Abnett*, looked at these same minutes and found nothing in them to support the argument against giving less than full preemptive effect to Article 17's liability boundaries:

> But these are mere straws in the wind which emerged during several days of detailed discussion to which many delegates contributed. I do not find a sufficiently clear and consistent expression of views here about the objects of the Convention on the point which is at issue in this case to enable me to say that the answer to the problem is to be found in the minutes. The most that can be said is that I have not found anything in these minutes or in the accompanying material which contradicts the impression which I have already formed on reading the convention.

Abnett, 1 All E.R. at 208.

Third, the Second Circuit ignores this Court's strong admonition that the Convention should be construed consistently with the "shared expectations of the contracting parties," including most specifically, the desire to achieve uniformity in the laws governing international transportation by air. *Saks*, 470 U.S. 399. Its newly-minted "ordinary" injury concept covering injuries within the international air transportation scope of Article 17 – which it then illustrates with the example of a malfunctioning escalator causing injury *outside* the scope of Articles 17 and 24(2) -- would result in passengers claiming injury from the same incident on the same flight being treated differently if, for example, one claimed physical injury and one claimed non-physical injury for which relief is barred under Article 17. *See Floyd*,

499 U.S. at 552. No principle of uniformity could survive this concept whose practical result would be to ensure a mix of covered, Convention law, and "ordinary", state-law, claims in virtually every injury case.

2. In Denying Article 17 Full Preemptive Effect, The Court Ignored The Necessary Consequences Of Federal Preemption Analysis As Determined In The Fifth Circuit's *Potter* Decision.

It is undisputed that respondent's alleged harm occurred during embarkation in international travel by air and thus "inside" the substantive scope of the Warsaw Convention as defined by Articles 1 and 17. Nevertheless, the Second Circuit declares that respondent's remedy lies "outside" the Convention because she could not meet Article 17's requirements for establishing presumptive liability. *Tseng*, 122 F.3d at 104-05. The decision thus circumvented all of the Convention's conditions and limitations which establish uniform procedural, jurisdictional and substantive law for passenger liability.

In reaching this result, the Second Circuit failed to apply this Court's precedents on federal preemption. It also summarily rejected the Fifth Circuit's decision in *Potter v. Delta Air Lines*, 98 F.3d 881 (5th Cir. 1996) giving Article 17 full federal preemptive effect. *Tseng*, 122 F.3d at 107. This telling omission strongly suggests that the court below could find no flaw in the *Potter* court's reasoning or in its application of this Court's prior federal preemption decisions.

The Fifth Circuit's reasoning in *Potter* is indeed compelling. First, it properly followed this Court's guidance in *Floyd* and *Saks* by interpreting the Convention "in order

to advance its [apparent] goals." *Potter*, 98 F.3d at 885. To ascertain these goals, it cited this Court's findings in *Zicherman*, concluding that "[a] primary function of the Warsaw Convention is to foster uniformity in the laws governing international air carrier liability." *Id.*

Second, applying this Court's federal preemption criteria, the Fifth Circuit inquired whether the "area" requiring uniformity, that is, international passenger liability, would be frustrated if state court actions could be brought within the jurisdictional scope of Article 17 whenever the claimant could not meet one or more of that Article's requirements for establishing liability. *Id.* The court then undertook a detailed analysis to show how state-law actions would nullify significant Convention conditions and limitations, that this Court's previous decisions on the scope of allowable Article 17 recoveries would be circumvented, and that plaintiffs could "plead artfully" around Article 17 in order to "forum-shop" in U.S. courts. *Id.* at 885-86.

Ignoring the Fifth Circuit's compelling analysis, the Second Circuit attempted to dismiss *Potter* by contending (i) that the Convention's goal of uniformity "has not always been found feasible in all areas of international travel," (ii) even where possible, uniformity cannot justify altering the operating structure of the Convention, citing *Zicherman*, and (iii) uniformity could be achieved equally as well by allowing recovery outside the Convention, "under a uniform body of law." *Tseng*, 122 F.3d at 107. The first point, even if true in the abstract, does not diminish the need to preserve uniformity where it is feasible. *See Abnett*, 1 All E.R. at 212. The second point is valid only if the court's misreading of Article 24 is assumed. As to the third point, the *Potter* court explained that there is no "uniform body of law" applicable to the state-law based cases that the Second Circuit would allow. *Potter*, 98 F.3d at 886. To the

contrary, there are widely varying procedural and substantive laws in the 50 states, all of which would potentially be applicable. This is the antithesis of the uniformity on passenger liability law and procedure sought to be achieved by the signatories to the Convention.

B. The Second Circuit's Position Cannot Be Reconciled With The Shared Expectations Of The Parties To The Convention.

This Court has stated that the "shared expectations of the contracting parties" must be taken into account when interpreting the Convention. *Saks*, 470 U.S. at 399. One such unchallengeable expectation is uniformity of the law applicable to passenger liability. *Floyd*, 499 U.S. at 532. The Second Circuit acknowledges this as a goal of the parties to the Convention, but nonetheless asserts that this objective would be "absurd" or "illogical" if it meant that claimants within the jurisdictional scope of Article 17, but unable to satisfy its requirements for carrier liability, could not step "outside" the Convention and ignore all its conditions and limitations. *Tseng*, 122 F.3d at 106-07.

There is, however, no illogic to the parties' contrary shared expectation. Rather, it would be illogical to render illusory the concept of uniformity by creating a parallel "opt-out" personal liability regime wholly reliant on the differing domestic laws of the various nations around the world. In its *Abnett* decision, the House of Lords made this point clearly when it observed that the signatories did not "set[] alongside the convention . . . an entirely different set of rules which would distort the operation of the whole scheme." *Abnett*, 1 All E.R. at 213.

Moreover, a treaty-based determination that air carriers should not be exposed to liability, under a presumptive fault

regime, for non-corporal passenger injuries associated with individual reactions to the experience of flight or the processes involved with the embarking or disembarking of such flights hardly seems "absurd". *Id.* at 207.

Consistent with this expectation of limitations on carrier responsibility for non-accidental or non-corporal injury, the Convention requires that all passengers be given notice of the applicability of the treaty with respect to the air carriers' liability for damages. The notice provides passengers the opportunity to obtain supplemental insurance or to take other precautions before embarking on an international journey. Article 23 also invalidates "[a]ny provision [in the contract of carriage] tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention . . . ." As the Solicitor General has pointed out, it would have made no sense and would have been extremely one-sided and odd to have restricted the air carriers' right to limit liability by contract if passengers were free to pursue liability claims "within" Article 17 jurisdiction but "outside" its express terms. *See* Solicitor General's Brief in Support of Petition for Writ of Certiorari at 18-19; *see also*, *Dooley v. Korean Air Lines Co., Ltd.*, 118 S.Ct. 1890 (1998) (where Congress has struck a balance denying recovery for certain claims and claimants under Death On The High Seas Act, applicable under Article 17, Court cannot substitute its own views).

The Second Circuit's opinion would, therefore, render the Convention's goal of uniformity and its conditions and limitations on passenger liability a nullity. This result cannot be accepted as reflecting the "shared expectations" of the Convention's signatories, including the Government of the United States.

II. THIS COURT SHOULD REAFFIRM THE UNITED STATES' COMMITMENT TO A UNIFORM, GLOBAL PASSENGER COMPENSATORY LIABILITY REGIME.

The Warsaw Convention is the most widely adhered to private international law treaty. Some 120 nations are parties to the agreement. The Convention is universally recognized as a unique, remarkable achievement because of its establishment of a uniform liability regime for international transportation by air which provides certainty and common legal expectations for air carriers, passengers, and shippers throughout the world. Since its proclamation by President Franklin Delano Roosevelt on October 29, 1934, the Convention has been the supreme law of the land. *See*, 49 Stat. 3000 *et seq.*; *cf.*, *Zicherman*, 516 U.S. at 226.

To preserve "uniformity in the law of international air travel," *Zicherman*, 516 U.S. at 330, against concerns that certain of the Convention's limits were unduly restrictive on passengers, IATA and the world's air carriers have, during the past several decades, undertaken certain voluntary initiatives to modernize and liberalize those rules. Thus, in 1966, the airlines entered into a multilateral agreement under which they voluntarily raised the Article 22(1) limit of liability for personal injury or death to $75,000 and waived the non-negligence defense in Article 20(1) for claims up to that amount, thus providing for virtual strict liability when such damages had been demonstrated. More recently, when it became apparent that governments were unable to succeed in modernizing the liability regime through treaty amendment, IATA and the world's leading air carriers once again liberalized the liability rules, this time waiving all Article 22(1) liability limits for passengers worldwide, and their Article 20(1) non-negligence defenses for U.S.-related

transportation up to 100,000 Special Drawing Rights, or approximately $135,000.

These voluntary waivers, however, have depended, and continue to depend, on the maintenance of a common, uniform understanding that Article 17 bounds the claims that can be brought. By reaffirming the need for global uniformity on the law of passenger liability and rejecting the Second Circuit's contrary position, this Court can further the airlines' initiative to globalize these waivers to the benefit of all international passengers.

A. The Air Carriers' Current Initiative To Modernize And Liberalize The Warsaw Convention's Worldwide Article 17 Passenger Compensatory Liability Regime Is Ongoing And Had Had The Strong Support Of The U.S. Department of Transportation.

To comprehend fully the impact of the Second Circuit's decision, it is necessary for this Court to understand in some detail the extensive efforts by IATA and the world's air carriers and the DOT in fashioning the most recent changes to the Warsaw passenger liability regime.

The process began on February 22, 1995 when the DOT granted IATA's application for so-called "discussion authority." *Order on Discussion Authority Regarding Limits and Conditions of Passenger Liab. Est. by the Warsaw Convention*, 60 Fed. Reg. 12813 (Dep't of Transp. 1995). This authority, under 49 U.S.C. §§ 41308 and 41309, granted antitrust immunity for the air carriers to discuss and reach agreements on changing or even eliminating the limitation of liability in Article 22(1) of the Convention and waiving one or more of the defenses found in Articles 20(1)

and 21. Pursuant to this "discussion authority," representatives of the world's air carriers held a series of meetings in Washington which were monitored by the DOT and the Department of Justice.

The first agreement to emanate from these sessions was the "IATA Intercarrier Agreement on Passenger Liability." This agreement, which came to be known as the "IIA," was unanimously endorsed at the IATA Annual General Meeting on October 31, 1995. It is an umbrella agreement pursuant to which the air carriers agree, *inter alia*, "[t]o take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention . . . ."[6] The IIA reserves all available Convention defenses, but provides that any air carrier may waive any defense, including the waiver of any defense up to a specified monetary amount of recoverable compensatory damages, as the circumstances may permit. Thus, by the fall of 1995, many of the world's air carriers had taken the first step toward waiving any limitation of liability to compensate for injuries cognizable under Article 17.

The next step was to reach agreement on measures to implement the IIA in air carrier tariffs and conditions of carriage. Further meetings of the air carriers were held pursuant to DOT discussion authority. IATA carriers evolved the "Agreement on Measures to Implement the IATA Intercarrier Agreement" ("MIA"), under which signatories agreed to tariff language waiving, *inter alia*, any limitation of liability under Article 22(1) for all recoverable compensatory damages arising under Article 17. Air carriers

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[6] The full text of the IIA is found at Appendix B.

also could use the MIA tariff language to waive Article 20(1) non-negligence defenses for portions of the claims that did not exceed 100,000 Special Drawing Rights, or the equivalent of approximately $135,000 at current exchange rates.[7] In other words, carriers, responding to the DOT, could agree to virtual strict liability up to the latter amount and waive any financial limitation on compensatory damages.

U.S. air carriers, many of which are also IATA members, developed a further agreement under the auspices of the Air Transport Association of America ("ATA"). This agreement, called the "ATA Provisions Implementing the IATA Intercarrier Agreement to be Included in Conditions of Carriage and Tariffs" ("IPA"), took the additional step of permitting, subject to applicable law, recoverable Article 17 compensatory damages to be determined by reference to the law of the domicile or permanent residence of the passenger.

The three air carrier agreements were submitted to the DOT on July 31, 1996 for approval and antitrust immunity under 49 U.S.C. §§ 41308 and 41309. On October 3, 1996, the DOT issued a Show Cause Order tentatively approving the agreements and recommending certain conditions. *International Air Transp. Assoc.: Agreement Relating to Liab. Limitations of The Warsaw Convention*, Order 96-10-7, 1996 WL 563872 (Dep't of Transp. Oct. 3, 1996). In its Order, the DOT specifically found that "[w]ith their provision for the worldwide waiver of the Warsaw passenger liability limits, the agreements have made a gigantic step toward creating an international liability regime under which carriers properly accept liability for death or injuries of passengers utilizing their service." *Id.*, 1996 WL 563872 at

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[7] The full text of the MIA is found at Appendix C.

*5. The agreements were given final DOT approval on January 8, 1997. *International Air Transp. Assoc.: Agreement Relating to Liab. Limitations of The Warsaw Convention*, Order 97-1-2, 1997 WL 4834 (Dep't of Transp. Jan. 8, 1997).

B. The Air Carriers' Efforts To Modernize The Warsaw Convention Passenger Liability Regime Worldwide Would Be Seriously Impaired If the Convention Is Not Read To Provide The Exclusive Remedy For Personal Injuries In "International Transportation."

The extraordinary effort spearheaded by IATA and the world's air carriers with the support of the U.S. DOT to modernize and liberalize terms of the Warsaw Convention is driven by the value air carriers place on global uniformity in passenger liability. IATA has undertaken a worldwide campaign, in cooperation with many member air carriers, to persuade all international air carriers to sign the IIA and the MIA. The agreements are currently being considered by air carriers throughout the world. As of July 9, 1998, the IIA had 107 signatories and the MIA had 67 signatories.[8]

Much work remains to be done to encourage true, global acceptance of the new, liberalized regime. Until this task has been completed, the full benefits -- the "gigantic step" to which the DOT referred -- will not be available to passengers on international flights throughout the world, including the millions of United States citizens who travel between foreign points having no contact with this country.

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[8] A list of the signatories is found at Appendix D.

For all such passengers, the Warsaw Convention -- hopefully as modified by the IATA air carriers' agreements -- will provide their best protection.

IATA, and its air carrier members, undertook this effort to modernize and liberalize the passenger liability provisions of the Convention in the expectation that Article 17 would be given the full preemptive effect that is reflected in the House of Lords' *Abnett* decision and in the Fifth Circuit's *Potter* decision. These decisions provide the certainty on the extent of liability risks that is the *quid pro quo* for the air carriers' willingness to waive liability limits under the Convention's presumptive fault regime and to take the additional step of waiving Article 20(1) defenses up to 100,000 Special Drawing Rights for United States-related traffic.

Throughout this modernization process, IATA and its air carriers have been reinforced in these beliefs by the DOT's recognition that a uniform, global passenger liability regime was in the best interest of all passengers, but most particularly, United States passengers. Thus, at the beginning of the process, in its Order granting "discussion authority" on February 22, 1995, the DOT recognized that the United States could not simply "order" foreign nations to accord U.S. citizens the relief which it may believe is most appropriate in the event of harm during international transportation as defined by Article 1(2) of the Convention. In discussing and rejecting alternatives to an air carrier voluntary effort to liberalize and modernize the Warsaw Convention, the DOT specifically observed:

> A final alternative would be for the United States to unilaterally establish a regime that all carriers operating to the United States would have to abide by. This approach, however, could engender such significant

> opposition from our trading partners that our ability to implement the plan unilaterally would very well be jeopardized.

60 Fed. Reg. at 12813.

The DOT went on to note that:

> IATA seeks discussions geared toward producing a temporary arrangement, recognizing the immediate need to increase the liability limits through a uniform system of rules. This is fully consistent with our objectives.

Id.

Lastly, the DOT commented:

> We have strived for a uniform international system that allows U.S. victims to receive fair recoveries within a reasonable period of time.

Id., at 12814.

The Second Circuit's decision denying preemptive effect to Article 17 places in jeopardy the *quid pro quo* on which the voluntary carrier agreements have been undertaken. It would be far more difficult, if not impossible, for IATA to persuade other air carriers to join these agreements if the U.S. commitment to a uniform liability regime is not apparent. It might prove equally difficult to go forward to an enhanced, uniform treaty regime if the state-law based actions permitted by the decision below were approved by this Court. Thus, the Second Circuit's decision, if affirmed, could greatly shorten the "gigantic step" that the DOT believed the IATA air carrier agreements would achieve for all passengers, and in particular, citizens of the United States. IATA therefore respectfully submits that this Court

should follow the recommendation of the Solicitor General[9] and reject the Second Circuit's erroneous interpretation of the Convention.

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[9] In his Brief in Support of Petition for Writ of Certiorari at 12, the Solicitor General notes that there are no issues presented here involving Article 25. That Article, in the case of "willful misconduct" precludes air carrier resort to "provisions of this convention which exclude or limit his liability." Any suggestion that allegations of "willful misconduct" based on Article 25 also permit claimants to avoid the requirements of Article 17, which deal with the establishment of liability rather than its exclusion or limitation, would find no support in the language, structure or purpose of the Convention.

CONCLUSION

The judgment of the Second Circuit Court of Appeal should be reversed.

Respectfully submitted,

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Dated: July 16, 1998

APPENDIX A

Article 1(2)

(2) For the purpose of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

Article 3(1)(e)

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

. . .

(e) a statement that the transportation is subject to the rules relating to liability established by this convention.

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 20(1)

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

Article 22(1)

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [8300 Special Drawing Rights]. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract,

which shall remain subject to the provisions of this convention.

Articles 24(1) and 24(2)

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

1 b

APPENDIX B

IATA INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS, The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention[1] as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.

2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.

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1 "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air singed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.

4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.

5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.

6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.

7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).

8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this ____ day of _____ 199_

APPENDIX C

AGREEMENT ON MEASURES TO IMPLEMENT THE IATA INTERCARRIER AGREEMENT

I. Pursuant to the IATA Intercarrier Agreement of 31 October 1995, the undersigned carriers agree to implement said Agreement by incorporating in their conditions of carriage and tariffs, where necessary, the following:

1. {CARRIER} shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.

2. {CARRIER} shall not avail itself of any defence under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs[1] [unless option II(2) is used].

3. Except as otherwise provided in paragraphs 1 and 2 hereof, {CARRIER} reserves all defences available under the Convention to any such claim. With respect to third parties, the carrier also reserves all rights of recourse against any other person, including without limitation, rights of contribution and indemnity.

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1 Defined if necessary.

II. At the option of the carrier, its conditions of carriage and tariffs also may include the following provisions:

1. {CARRIER} agrees that subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.

2. {CARRIER} shall not avail itself of any defence under Article 20(1) of the Convention with respect to that portion of such claims which does not exceed 100,000 SDRs, except that such waiver is limited to the amounts shown below for the routes indicated, as may be authorised by governments concerned with the transportation involved.

[Amounts and routes to be inserted]

3. Neither the waiver of limits nor the waiver of defences shall be applicable in respect of claims made by public social insurance or similar bodies however asserted. Such claims shall be subject to the limit in Article 22(1) and to the defences under Article 20(1) of the Convention. The carrier will compensate the passenger or his dependents for recoverable compensatory damages in excess of payments received from any public social insurance or similar body.

III. Furthermore, at the option of a carrier, additional provisions may be included in its conditions of carriage and tariffs, provided they are not inconsistent with this Agreement and are in accordance with applicable law.

IV. Should any provision of this Agreement or a provision incorporated in a condition of carriage or tariff pursuant to this Agreement be determined to be invalid, illegal or unenforceable by a court of competent jurisdiction, all other provisions shall nevertheless remain valid, binding and effective.

V. 1. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become Party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).

2. Any carrier Party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers Parties to the Agreement.

3. The Director General of IATA shall declare this Agreement effective on November 1st, 1996 or such later date as all requisite Government approvals have been obtained for this Agreement and the IATA Intercarrier Agreement of 31 October, 1995.

Signed this ____ date of _____ 1996.

APPENDIX D

Signatories to IIA Agreement as of July 9, 1998

Aero Lingus plc
Aerolineas Argentinas S.A.
Aeromexpress
Aervias de México, S.A. de C.V. (Aeromexico)
Air Afrique
Air Aruba
Air Baltic Corporation SIA
Air Canada
Air Exel Commuter
Air France
Air Jamaica Limited
Air Mauritius
Air New Zealand
Air Pacific Limited
Air UK Group Limited
Air Vanuatu
Alaska Airlines
Alitalia
All Nippon Airways Co., Ltd.
Allegheny Airlines, Inc.
America West Airlines, Inc.
American Airlines
American Trans Air, Inc.
Asiana
Augsburg Airways GmbH
Austrian Airlines
Avianca
Azerbaijan Hava Yollary
Braathens S.A.F.E.
British Airways, plc

Canadian Airlines, International
Cathay Pacific Airways, Ltd.
Central Mountain Air Ltd.
Cimber Air A/S
Compagnie Air France Europe
Continental Airlines, Inc.
Continental Express
Continental Micronesia
Croatia Airlines
Crossair
CSA - Czech Airlines
Delta Air Lines, Inc.
Deutsche BA Luftfahrtgesellschaft mbH
Deutsche Lufthansa AG
Egyptair
Emirates
Estonian Air
Eurowings Luftverkehrs AG
Finnair OY
Garuda Indonesia
GB Airways
Hawaiian Airlines
Heli Air AG
Heli-Linth AG
Iberia
Icelandair
Interimpex-Avioimpex
Japan Air Charter (JAZ)
Japan Air System Co. Ltd.
Japan Airlines Co. Ltd.
Japan Asia Airways (JAA)
Jet Airways (India) Pvt Ltd.

Kenya Airways
Kiwi International Air Lines
KLM Cityhopper B.V.
KLM Royal Dutch Airlines
Korean Air Lines Co., Ltd.
LAPSA Lineas Aéreas Paraguayas
Lauda Air Luftfahrt AG
Luxair
Maersk Air A/S
Maersk Air Ltd.
Malaysia Airlines
Malev - Hungarian Airlines Public Ltd. Co.
Martinair Holland N.V.
Midwest Express Airlines, Inc.
Northwest Airlines
Pakistan International Airlines (PIA)
PGA Portugália Airlines
Piedmont Airlines, inc.
Polskie Linie Lotnicze - Polish Airlines
PSA Airlines, Inc.
Qantas Airways Limited
Reeve Aleutian Airways, Inc.
Regional Airlines
Royal Air Maroc
SABENA
Saudi Arabian Airlines Corp.
Scandinavian Airlines Systems (SAS)
Singapore Airlines Ltd.
Sobelair
South African Airways
Swissair
TACA

TAP Air Portugal
TAT European Airlines
Trans World Airlines Inc. (TWA)
Transavia airlines C.V.
Transbrasil S/A Linhas Aéreas
Trinidad & Tobago BWIA International
Türk Hava Yollari A.O. (Turkish Airlines Inc.)
Tyrolean Airways - Tiroler Luftfahrt -AG
United Airlines
UPS Airlines
USAir, Inc.
Varig S.A.
VIASA

Signatories to MIA Agreement as of July 9, 1998

Air Afrique
Air Baltic Corporation SIA
Air Canada
Air France
Air New Zealand
Air Pacific Limited
Alaska Airlines
Allegheny Airlines, Inc.
America West Airlines, Inc.
American Airlines
American Trans Air, Inc.
AMR Combs BJS, Inc.
AMR Eagle, Inc.
Asiana
Austrian Airlines
Avianca
British Airways, plc

Canadian Airlines, International
Cathay Pacific Airways, Ltd.
Central Mountain Air Ltd.
Compagnie Air France Europe
Continental Airlines, Inc.
Continental Express
Continental Micronesia
Crossair
CSA - Czech Airlines
Delta Air Lines, Inc.
Deutsche BA Luftfahrtgesellschaft mbH
Deutsche Lufthansa AG
Estonian Air
Finnair OY
GB Airways
Hawaiian Airlines
Heli Air AG
Heli-Linth AG
Icelandair
Kenya Airways
Kiwi International Air Lines
KLM Royal Dutch Airlines
Korean Air Lines Co., Ltd.
Lauda Air Luftfahrt AG
Luxair
Maersk Air A/S
Maersk Air Ltd.
Midwest Express Airlines, Inc.
Northwest Airlines
PGA Portugália Airlines
Piedmont Airlines, Inc.
PSA Airlines, Inc.

Qantas Airways Limited
Reeve Aleutian Airways, Inc.
Royal Air Maroc
SABENA
Scandinavian Airlines Systems (SAS)
Singapore Airlines Ltd.
Sobelair
Swissair
TAP Air Portugal
TAT European Airlines
Trans World Airlines Inc. (TWA)
Transavia Airlines C.V.
Transbrasil S/A Linhas Aéreas
Türk Hava Yollari A.O. (Turkish Airlines Inc.)
Tyrolean Airways - Tiroler Luftfahrt -AG
United Airlines
UPS Airlines
USAir, Inc.
Varig S.A.